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PUBLISHERS' NOTE.

Thinking that the Attorneys would wish to have their **CODES OF CIVIL PRACTICE** in a volume by themselves, and to have them at once, the publishers have divided the matter in this work very unequally. The second volume containing the Political, Civil and Criminal Codes and the Code of Criminal Procedure, about 1100 pages of matter, is now being rapidly put through the press, and will be issued at an early day.

THE ANNOTATED
REVISED CODES
OF THE
TERRITORY OF DAKOTA,
1883.

VOLUME I,
EMBRACING

THE CODE OF CIVIL PROCEDURE,
THE PROBATE CODE, THE JUSTICES' CODE.

With Notes and References, and a New Index.

EDITED BY
A. B. LEVISEE and L. LEVISEE.

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PREFACE.

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IT may be safely asserted that Dakota has as good a system of Codes as any of her sister states or territories. Perhaps, since it is the latest, or one of the latest, revisions or digests of the system of laws which is now common to many of the states, a just superiority might be claimed for it over that of any other. It is hardly probable that every reader of these Codes will concur in this opinion, but we believe that a great majority of those who make it a diligent study will. But, next to a complete system of statutory laws, conveniently arranged, an adequate index is the first necessity to the practicing lawyer. The vexation resulting from unavailing search and consequent loss of time is known to every lawyer. It was the defects and incompleteness of the index to the former editions of the Codes that first suggested to the editors of this edition the preparation of a fuller and more complete index to the entire work. The prosecution of this labor led to the further idea of concording the corresponding sections of the different Codes, and still further on to the idea of annexing to the text suitable references and notes for the convenience of the profession. It now became obvious that all this would make a very large and cumbrous volume, and hence the conclusion to divide the work, making a separate volume of the Code of Civil Procedure, Probate, and Justice's Codes. This division of the work makes the volumes of very unequal size, as the second volume will contain more than twice as much matter as the first; but it was thought that it would be more convenient to the attorney to have his Codes of Civil Practice in a volume by themselves.

It is well known to the profession that our Codes are for the most part transcripts from the New York Code and the California Code. In many cases the provisions in these different Codes are identical, in others similar; and to aid the searcher in a more rapid investigation it was thought desirable, under each of the several sections, to refer to the corresponding sections of the New York Code as published in Wait's Practice, where will generally be found digested all the leading decisions in that state on each particular subject down to a very late date; and the same for California, for which we have used Harston's Practice, thus furnishing to the profession a ready reference to two distinct lines of decisions, both of which are peculiarly apposite to the development of our practice. In addition to this an attempt has been made to furnish further aid by reference to judicial decisions. The paucity of decisions by the supreme court of this territory has made it necessary to go outside of the territory for this purpose. Assuming that the series of reports published in the Northwestern Reporter, while of equal authority with any other reports, is at once more comprehensive and more generally in the hands of the profession than any other one series, we have made most of our references to it.

L. & L.

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ABBREVIATIONS.

Wait, Code—*Wait's (N. Y.) Code of Civil Procedure, Annotated.*

Harst. Pr.—*Harston's Practice, Pleading, and Evidence, (the California Code of Civil Procedure, Annotated.)*

Dak.—*Dakota Reports, vols. I and II.*

N. W. Rep.—*Northwestern Reporter, vols. I to XV.*

Minn. (Gil.)—*Minnesota Reports, Gilfillan Edition, vols. I to XX.*

Minn.—*Minnesota Reports, vols. XXI to XXIX.*

Sec. *or* Secs. *in citations invariably refers to the sections of that Code in which the citation is given.*

REVISED CODES

OF THE

TERRITORY OF DAKOTA.

CODE OF CIVIL PROCEDURE.

An Act to Establish a Code of Civil Procedure for Dakota Territory.

GENERAL DEFINITIONS AND DIVISIONS.

§ 1. **Title and parts of act.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* This act shall be known as the Code of Civil Procedure of the Territory of Dakota, and is divided into three parts, as follows:

PART 1. Of Courts of Justice.
PART 2. Of Civil Actions.
PART 3. Of Special Proceedings of a Civil Nature.

Wait, Code, 8; Harst. Pr. 1.

§ 2. **Not retroactive.** No part of it is retroactive unless expressly so declared.

Harst. Pr. 3.

§ 3. **Code excludes common law.** The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this territory, respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice.

Wait, Code, 467; Harst. Pr. 4.

§ 4. **Prior rights.** No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code, so far as applicable.

Harst. Pr. 8.

§ 5. **Limitation continues.** When a limitation or period of time prescribed in any existing statute for acquiring a right, or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code.

Harst. Pr. 9.

§ 6. **Computation of time.** The time in which any act provided by law is to be done, is computed by excluding the first day, and including the last, unless the last is a holiday, and then it is also excluded.

Wait, Code, 407; Harst. Pr. 12; Dale v. Dodridge, 1 N. W. Rep. 991; Worley v. Naylor, 6 Minn. (Gil.) 123.

§ 7. **Construction of language.** Words and phrases are constructed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

Harst. Pr. 16.

§ 8. **Words defined.** The following words have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "writ" signifies an order or precept in writing, issued in the name of the territory or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings.
2. The word "state," when applied to the different parts of the United States, includes the district of Columbia and the territories; and the words "United States" may include the district and territories.

Harst. Pr. 17.

§ 9. **Effect upon former laws.** No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this territory, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided; nor does it affect any private statute not expressly repealed.

Harst. Pr. 18.

§ 10. **Act, how cited.** This act, whenever cited, enumerated, referred to, or amended, may be designated simply as the Code of Civil Procedure, adding, when necessary, the number of the section.

Harst. Pr. 19.

§ 11. **Remedies classified.** Remedies in the courts of justice are divided into:

1. Actions.
2. Special proceedings.

Wait, Code, 1; Harst. Pr. 21.

§ 12. **Action defined.** An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

Wait, Code, 2; Harst. Pr. 22.

§ 13. **Special proceedings.** Every other remedy is a special proceeding.

Wait, Code, 3; Harst. Pr. 23.

§ 14. **Actions classified.** Actions are of two kinds:

1. Civil.
2. Criminal.

Wait, Code, 4; Harst. Pr. 24.

§ 15. **Criminal defined.** A criminal action is one prosecuted by the territory, as a party, against a person charged with a public offense, for the punishment thereof.

Wait, Code, 5.

§ 16. **Civil—process.** Every other is a civil action; and all process in civil actions shall run in the name of the territory of Dakota.

Wait, Code, 6.

§ 17. **Not merged.** Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Wait, Code, 7; Harst. Pr. 32.

PART I.

COURTS OF JUSTICE AND THEIR JURISDICTION.

CHAPTER I.

OF THE COURTS IN GENERAL.

§ 18. **Courts.** The following are the courts of justice of this territory:

1. The supreme court.
2. The district courts.
3. The probate courts; and,
4. The courts of justices of the peace.

Wait, Code, 9; Harst. Pr. 33.

§ 19. **Jurisdiction continued.** These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by law.

Wait, Code, 10.

CHAPTER II.

OF THE SUPREME COURT.

§ 20. **Jurisdiction classified.** The jurisdiction of the supreme court is of two kinds:

1. Original; and,
2. Appellate.

Harst. Pr. 42.

§ 21. **Original.** Its original jurisdiction extends to all writs which by law may issue from this court, and to all writs necessary to the exercise of its appellate jurisdiction.

Harst. Pr. 43; secs. 685, 695, 709.

§ 22. **Exclusive appellate jurisdiction.** It has exclusive jurisdiction to review, upon appeal, every actual determination hereafter made at any regular or special terms of the district courts of this territory, in the following cases, and no other:

1. In a judgment in an action commenced therein, or brought there from another court, and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right made in such action, when such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, or strikes out a pleading or any part of a pleading, or arises upon any interlocutory proceeding or any question of practice in the action, and does not involve any question of discretion, or grants or refuses a new trial, or sustains or overrules a demurrer, or grants, refuses, continues, or modifies a provisional remedy; but no appeal to the supreme court from an order granting a new trial shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, if the supreme court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render the judgment effectual may be there had in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from.

Sec. 424.

4. Whenever the decision of any motion heretofore made, or any motion hereafter to be made, in the district court of this territory, at a special term thereof, involves the constitutionality of any law of this territory, or has been or shall be placed, in the opinion or reason for such decision of the justice making such decision, upon the unconstitutionality of such law, then an appeal shall lie and may be made from such decision, or from the order entered, or to be entered, upon such decision to the general term of said supreme court: *provided, however*, that the time for appealing from such decision, or from such order, shall not be extended hereby.

5. It is further provided that this section shall not be construed to allow an appeal from any order to the supreme court before the final determination of the action in which such order is made; but upon the final judgment or decision being rendered, the appellant, on his appeal from such final judgment or decision, may have any intermediate order enumerated in this section, reviewed by the supreme court, by designating such order sought to be reviewed in his notice of appeal from the final judgment or decision; and an appeal from such order may be taken within two years after such final judg-

ment or decision shall be perfected by filing the judgment roll. *(As amended Feb. 20, 1879.)*

Wait, Code, 11; Harst. Pr. 44, 963.

(*a*) No appeal can be taken until after final judgment. Harris Manuf'g Co. v. Walsh, 3 N. W. Rep. 307, (Dak.;) Stevens v. Gale, 9 N. W. Rep. 99, (Dak.;) 1 Dak. 224; Ashton v. Thompson, 9 N. W. Rep. 876, (Mich.;) Croft v. Miller, (Minn.) 4 N. W. Rep. 45.

(*b*) An appeal will lie from an order appointing a receiver. Simon v. Schloss, (Mich.) 12 N. W. Rep. 196; Morey v. Grant, (Mich.) 12 N. W. Rep. 202. From an order condemning land for use of railroad. Wisconsin Cent. R. Co. v. Cornell University, (Wis.) 5 N. W. Rep. 331. From an order confirming sale of real estate. Bank of Nebraska v. Green, (Neb.) 1 N. W. Rep. 210; 4 N. W. Rep. 71; 9 N. W. Rep. 36. From an order vacating a prior judgment. Hansen v. Bergquest, (Neb.) 2 N. W. Rep. 858; 1 N. W. Rep. 703. From an order striking out allegations of complaint. Stanley v. City of Davenport, (Iowa,) 2 N. W. Rep. 1064. From an order striking cause from calendar. Lee v. Buckheit, (Wis.) 4 N. W. Rep. 1077; 5 N. W. Rep. 796. From an order denying motion to strike cause from calendar. Tucker v. Grover, (Wis.) 9 N. W. Rep. 820. From an order dismissing an action. Rodgers v. Russell, (Neb.) 9 N. W. Rep. 547; 2 N. W. Rep. 858. From an order refusing to set aside an order of dismissal. Yetzer v. Marlin, (Iowa,) 12 N. W. Rep. 630. From an order granting change of venue. Gilman v. Donovan, (Iowa,) 12 N. W. Rep. 779. But see Graves v. Richmond, *contra*, 12 N. W. Rep. 80. From an order refusing to vacate a sale in partition. Kemp v. Hein, (Wis.) 3 N. W. Rep. 831; Ramsay v. Abrams, 12 N. W. Rep. 555. From an order perpetuating an injunction. Crowell v. Horack, (Neb.) 12 N. W. Rep. 99. From an order on sheriff to show cause. Coykendall v. Way, (Minn.) 12 N. W. Rep. 452. See 1 N. W. Rep. 585. From an order granting a new trial. Ex rel. v. Judge of Sup. Ct. (Mich.) 2 N. W. Rep. 180; La Salle v. Tift, 2 N. W. Rep. 1031; 13 Minn. 398; Swift v. James, 7 N. W. Rep. 656. From an order refusing a new trial. Ashton v. Thompson, (Minn.) 9 N. W. Rep. 876; Transfer Co. v. Rheiner, (Minn.) 12 N. W. Rep. 449. From an order debarring an attorney from practicing. In re Orton, (Wis.) 11 N. W. Rep. 584. See Pol. Code, *c.* 18, § 16. From an order sustaining a demurrer. Van Patten v. Burr, (Iowa,) 3 N. W. Rep. 524; 12 N. W. Rep. 276. Order overruling demurrer. Kirchner v. Wood, (Mich.) 12 N. W. Rep. 44. From an order distributing an estate. Ramsey v. Abrams, (Iowa,) 12 N. W. Rep. 555. From an order enlarging the time for settling bill of exceptions. Evans v. St. Paul F. & M. Ins. Co. 11 N. W. Rep. 594.

(*c*) Appeal will not lie from an order of the district court affirming judgment of justice of peace. Chesterson v. Munson, (Minn.) 3 N. W. Rep. 695; Nat. Bank. v. Schofield, (Neb.) 4 N. W. Rep. 71. *Contra*, see, Chesterton v. Munson, (Neb.) 8 N. W. Rep. 593. From an order taxing costs. (Minn.) 12 N. W. Rep. 146; (Neb.) 7 N. W. Rep. 289. From an order allowing amendment of complaint before trial. (Minn.) 6 N. W. Rep. 795. From an order staying execution. Felt v. Amidon, (Wis.) 3 N. W. Rep. 825. From a judgment by justice of peace on default. Minneapolis Harvester Works v. Hedges, (Neb.) 7 N. W. Rep. 531. From an order disallowing certain items in administrator's account. Showers v. Morrill, (Mich.) 3 N. W. Rep. 193. From judgment by consent of parties. Chapin v. Perrin, (Mich.) 8 N. W. Rep. 721.

See sec. 411 and notes.

§ 23. **Scope of judgment.** The supreme court may reverse, affirm, or modify the judgment or order appealed from in whole or part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law; and may direct the proper judgment or order to be entered; or direct a new trial or further proceedings to be had.

Wait, Code, 12; Harst. Pr. 45.

§ 24. **Terms—calendar.** The times and places for holding the terms of the supreme court shall be and remain as is now or may hereafter be provided by law. The court may provide what causes shall have a preference on the calendar, and regulate the practice and proceedings therein by general rules not inconsistent with the organic act and the statutes of this territory. On a second and each subsequent appeal to the supreme court, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal; and whenever, in any action or proceeding in which the territory of Dakota, or any territorial officer, or any board of territorial officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them, in any court, such appeal shall have a preference in the supreme court, and may be moved by either party out of the order on the calendar.

Wait, Code, 13.

§ 25. **Two judges must concur.** The concurrence of two judges is necessary to pronounce a judgment. If two do not concur, the cause must be reheard. But no more than two rehearings shall be had; and if, on the second hearing, two judges do not concur, the judgment shall be affirmed.

Wait, Code, 14, 19; Harst. Pr. 47; Mitchel v. Mitchel, (Mich.) 12 N. W. Rep. 914.

§ 26. The supreme court may be held in other buildings than those designated by law as places for holding courts, and at a different place in the same city from that at which it is appointed to be held. Any one or more of the justices may adjourn the court with the like effect as if all were present, and may announce and have placed on file the opinion of the court. *(As amended February 22, 1879.)*

Harst. Pr. 46; Wait, Code, 16.

CHAPTER III.

OF THE DISTRICT COURT.

§ 27. **Chancery and common law.** The district courts possess chancery as well as common-law jurisdiction.

§ 28. **Exclusive original jurisdiction.** They have exclusive original jurisdiction in all actions or proceedings in chancery, and in all actions at law where the debt or sum claimed exceeds one hundred dollars; and in all cases in which the title to real property or the boundary thereof in anywise comes in question, except in actions for forcible entry or forcible and unlawful detainer, and in all actions for divorce and to obtain a decree of nullity of marriage, and in all such other cases as now are or may hereafter be provided by law.

Wait, Code, 30; Harst. Pr. 57.

§ 29. **Of appeals.** They have jurisdiction of appeals from all final judgments of justices of the peace, and from all judgments, decrees, or orders of the probate court, or other inferior officers or tribunals, in the cases prescribed by statute. They have also the power to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and all other writs necessary to carry into effect their judgments, decrees, and orders, and to give them a general control over inferior courts, officers, boards, tribunals, and jurisdictions.

Wait, Code, 30; Harst. Pr. 57, 84, 85.

§ 30. **Other jurisdiction.** They also possess all such criminal as well as civil jurisdiction as is conferred by the organic laws, and the statutes of this territory.

Harst. Pr. 57.

§ 31. **Always open for certain purposes.** For the purpose of hearing and determining special proceedings of a civil nature, motions for new trials in civil actions, motions for and to dissolve or modify injunctions, motions to set aside or vacate orders of arrest and writs of attachment, and for the entry of orders and judgments, these courts are always open; and the judge may hear and determine the same, and make an order in vacation at any place within the district. (*As amended March 3, 1881.*)

Wait, Code, 27; Harst. Pr. 57; Dakota v. Shearer, 8 N. W. Rep. 135.

CHAPTER IV.

OF PROBATE COURTS AND COURTS OF JUSTICES OF THE PEACE.

§ 32. **Jurisdiction.** The probate courts and the courts of justices of the peace possess only such jurisdiction as is conferred on them by the organic laws and the statutes of this territory.

Wait, Code, 30; Harst. Pr. 94–100.

PART II.

CIVIL ACTIONS.

CHAPTER V.

FORM OF CIVIL ACTIONS.

§ 33. **Distinctions abolished.** The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this territory, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

Wait, Code, 69; Harst. Pr. 307; Gress v. Evans, 1 Dak. 387.

§ 34. **Parties named.** In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Wait, Code, 70; Harst. Pr. 308; sec. 683.

§ 35. **Actions upon judgments.** No action shall be brought upon a judgment rendered in any court of this territory, except a court of a justice of the peace, between the same parties, without leave of the court, for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county, within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

Wait, Code, 71.

§ 36. **Issues must be stated.** Feigned issues are abolished, and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

Wait, Code, 72; Harst. Pr. 309; City of Winona v. Thompson, (Minn.) 8 N. W. Rep. 148.

CHAPTER VI.

TIME OF COMMENCING ACTIONS.

IN GENERAL.

§ 37. **Limitations.** Civil actions can only be commenced within the periods prescribed in this Code, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

Wait, Code, 74; Harst. Pr. 312; Hurley v. Cox, (Neb.) 2 N. W. Rep. 705.

TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

§ 38. **By the territory.** The territory of Dakota will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the territory to the same, unless:

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or unless,
2. The territory, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

Wait, Code, 75; Harst. Pr. 315.

§ 39. **Persons claiming under.** No action shall be brought for, or in respect to, real property, by any person claiming by virtue of grants from the territory, unless the same might have been commenced, as herein specified, in case such grant had not been issued or made.

Wait, Code, 76; Harst. Pr. 316.

§ 40. **Extension of same.** When grants of real property shall have been issued or made by the territory, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the territory, or by any subsequent grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

Wait, Code, 77; Harst. Pr. 317.

§ 41. **Seizin within twenty years.** No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action.

Wait, Code, 78; Harst. Pr. 318.

§ 42. **Same.** No cause of action, or defense to an action, founded upon the title to real property, or to rents or services out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within twenty years before the committing of the act in respect to which such action is prosecuted or defense made.

Wait, Code, 79; Harst. Pr. 319.

§ 43. **One year after entry.** No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

Wait, Code, 80; Harst. Pr. 320.

§ 44. **Possession presumed.** In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

Wait, Code, 81; Harst. Pr. 321.

§ 45. **Occupation under written instrument.** Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Wait, Code, 82; Harst. Pr. 322.

§ 46. **Adverse possession.** For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument, or a judgment, or a decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant.
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Wait, Code, 83; Harst. Pr. 323.

§ 47. **Actual adverse holding.** Where it shall appear that there has been an actual continued occupation of premises, under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

Wait, Code, 84; Harst. Pr. 324.

§ 48. **Under claim not written.** For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Wait, Code, 85; Harst. Pr. 325.

§ 49. **Landlord and tenant.** Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Wait, Code, 86; Harst. Pr. 326.

§ 50. **Effect of descent.** The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

Wait, Code, 87; Harst. Pr. 327.

§ 51. **Disabilities extend time.** If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life;

—The time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defense made after that period.

Wait, Code, 88; Harst. Pr. 328.

TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

§ 52. **Other periods.** The periods prescribed in section thirty-seven for the commencement of actions other than for the recovery of real property, shall be as follows:

Wait, Code, 89; Harst. Pr. 335.

§ 53. **Twenty years.** Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.
2. An action upon a sealed instrument.

Wait, Code, 90; Harst. Pr. 336.

§ 54. **Six years.** Within six years:

1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section fifty-three.
2. An action upon a liability created by statute, other than a penalty or forfeiture.
3. An action for trespass upon real property.
4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.
5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.
6. An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Wait, Code, 91; Harst. Pr. 337.

§ 55. **Three years.** Within three years:

1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this territory, except where the statute imposing it prescribes a different limitation.

Wait, Code, 92; Harst. Pr. 338, 339.

§ 56. **Two years.** Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of this territory.

Wait, Code, 93; Harst. Pr. 340.

§ 57. **One year.** Within one year:

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

Wait, Code, 94; Harst. Pr. 340.

§ 58. **Balance of open account.** In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Wait, Code, 95; Harst. Pr. 344.

§ 59. **Forfeiture by person—territory.** An action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offense; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the territory, by the district attorney where the offense was committed.

Wait, Code, 96; Harst. Pr. 340.

§ 60. **Other relief ten years.** An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued.

Wait, Code, 97; Harst. Pr. 343.

§ 61. **Same to public and persons.** The limitations prescribed in this chapter shall apply to actions brought in the name of the territory, or for its benefit, in the same manner as to actions by private parties.

Wait, Code, 98; Harst. Pr. 345.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

§ 62. **When action deemed commenced.** An action is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or, if a corporation be defendant, to the sheriff or other of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

Wait, Code, 99; Harst. Pr. 350.

§ 63. **Exception—absentee.** If, when the cause of action shall accrue against any person, he shall be out of the territory, such action may be commenced within the terms herein respectively limited, after the return of such person into this territory; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this territory, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

Wait, Code, 100; Harst. Pr. 351.

§ 64. **Same—disabilities.** If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either;

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge; or in execution under the sentence of a criminal court, for a term less than his natural life;

The time of such disability is not a part of the time limited for the commencement of the action: *Provided,* that the period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.

Wait, Code, 101; Harst. Pr. 352.

§ 65. **Death.** If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Wait, Code, 102; Harst. Pr. 353.

§ 66. **War.** When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war is part of the period limited for the commencement of the action.

Wait, Code, 103; Harst. Pr. 354.

§ 67. **When judgment reversed.** If an action be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or if he die and cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

Wait, Code, 104; Harst. Pr. 355.

§ 68. **Stay by injunction, etc.** When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Wait, Code, 105; Harst. Pr. 356.

§ 69. **When disability available.** No person can avail himself of a disability, unless it existed when his right of action accrued.

Wait, Code, 106; Harst. Pr. 357.

§ 70. **Co-existing disabilities.** When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are all removed.

Wait, Code, 107; Harst. Pr. 358.

§ 71. **Bank notes.** This chapter does not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

Wait, Code, 108; Harst. Pr. 359.

§ 72. **Moneyed corporations.** This chapter shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Wait, Code, 109; Harst. Pr. 359.

§ 73. **New promise in writing.** No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

Wait, Code, 110; Harst. Pr. 360; Chadwick v. Cornish, 1 N. W. Rep. 55.

CHAPTER VII.

PARTIES TO CIVIL ACTIONS.

§ 74. **Party in interest.** Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section seventy-six; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

Wait, Code, 111; Harst, Pr. 367.

Receiver may sue in his official name. Secs. 223, 373. Successors, intestate or by will. Secs. 85, 86, 677; Wilson v. Bumstead, (Neb.) 10 N. W. Rep. 411; Phinny v. Warren, 1 N. W. Rep. 522.

One who takes a mortgage in his own name for the benefit of another may sue. Allen v. Kennedy, (Wis.) 5 N. W. Rep. 906. An attorney in an action may be admitted a party plaintiff to protect his lien. Reynolds v. Reynolds, (Neb.) 7 N. W. Rep. 322; 9 N. W. Rep. 689.

See, also, Budge v. Mott, 3 N. W. Rep. 381; Wilson v. Bartholomew, 7 N. W. Rep. 227; 10 N. W. Rep. 411; Hecht v. Ferris, 8 N. W. Rep. 82; Pratt v. Radford, 8 N. W. Rep. 606; 12 N. W. Rep. 354; Widner v. W. U. Tel. Co. 11 N. W. Rep. 407; Sick v. Mich. Aid Association, 12 N. W. Rep. 905.

§ 75. **Assignee—equities.** In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

Wait, Code, 112; Harst. Pr. 368.

Assignee in bankruptcy. McMasters v. Campbell, 2 N. W. Rep. 836; Id. 50; 7 N. W. Rep. 303; Wetmore v. McMillan, Sheriff, (Iowa,) 10 N. W. Rep. 725; Langdon v. Thompson, 25 Minn. 509.

§ 76. **Executors and trustees.** An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

Power of executors and administrators to sue. Sec. 677. See Prob. Code, 122, 124, 211, 212, 213, 218; Wait, Code, 113; Harst. Pr. 369.

§ 77. **Married Woman.** When a married woman is a party, her appearance, the prosecution or defense of the action, and the joinder with her of any other person or party, must be governed by the same rules as if she was single.

Wait, Code, 114; Harst. Pr. 370; May v. May, (Neb.) 2 N. W. Rep. 221.

§ 78. **By guardian for infant.** When an infant is a party, he must appear either by his general guardian, or by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court in which the action is prosecuted, or by a judge thereof, expedient to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him.

Wait, Code, 115; Harst. Pr. 372; Civil Code, Dak. 93; Prob. Code, 351; 3 N. W. Rep. 299; 12 N. W. Rep. 905; 4 N. W. Rep. 938; Mohr v. Porter, (Wis.) 8 N. W. Rep. 364.

§ 79. **How guardian appointed.** The guardian shall be appointed:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of summons. If he be under the age of fourteen, or neglects so to apply, then, upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this territory; if he has none, then to the infant himself, if over fourteen years of age, and within the territory; or, if under that age, and within the territory, to the person with whom such infant resides. And in actions for the partition of real property, or for the foreclosure of a mortgage, or other instrument, when an infant defendant resides out of this territory, the plaintiff may apply to the court, or a judge thereof, in which the action is pending, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy

of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant himself, or by service upon any relation or person with whom the infant resides, and either by mail or personally upon the person so served. And in case an infant defendant, having an interest in the event of the action, shall reside in any state with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem* for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem* process, pleadings, and notices in the action may be served in the like manner as upon a party residing in this territory.

Wait, Code, 116; Harst. Pr. 373; Schuek v. Hagar, 24 Minn. 339.

§ 80. **Guardian's security.** No guardian appointed for an infant under the provisions of this chapter shall be permitted to receive any money or other property of the infant, except costs and expenses allowed to the guardian by the court, or recovered by the infant in the action, until he has given sufficient security, approved by the judge of the court, to account for and apply the same under the direction of the court. And no person, appointed a guardian for the purpose of defending an action brought against an infant, shall be liable for costs of such action, unless specially charged by the order of the court for some personal misdemeanor therein.

Wait, Code, 420.

§ 81. **Who to be plaintiffs.** All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this chapter.

Wait, Code, 117, 427, 667; Harst. Pr. 378.

Non-joinder of necessary parties plaintiff. Pratt v. Radford, 8 N. W. Rep. 606; 12 N. W. Rep. 354; Slutts v. Chaffee, 4 N. W. Rep. 763; 1 N. W. Rep. 791; Fraley v. Bentley, 1 Dak. 25.

In action to enforce mechanic's lien. Sec. 667.

§ 82. **Defendants.** Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such action.

Wait, Code, 118; Harst. Pr. 379; secs. 364, 619, 638.

In action to foreclose mortgage. Sec. 619 ; 2 N. W. Rep. 218.

In action of ejectment. Sec. 638.

In action of partition. Sec. 552.

Non-joinder of parties defendant. Bengley v. Wheeler, 8 N. W. Rep. 75; 11 N. W. Rep. 653; Bouton v. Orr, 1 N. W. Rep. 704; 2 N. W. Rep. 1021, 1123; 3 N. W. Rep. 281. See Gibson v. Gibson, 1 N. W. Rep. 147, 192; 2 N. W. Rep. 705, 134, 715; 3 N. W. Rep. 281, 283; 7 N. W. Rep. 14, 243; 8 N. W. Rep. 22; 10 N. W. Rep. 810; 12 N. W. Rep. 179; 5 N. W. Rep. 1064, 597; 6 N. W. Rep. 887; 8 N. W. Rep. 606; 4 N. W. Rep. 763.

Misjoinder of parties defendant. 7 N. W. Rep. 14; 4 N. W. Rep. 69; 5 N. W. Rep. 597.

§ 83. **Parties to be joined.** Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Secs. 81, 82, 136; Wait, Code, 119; Harst. Pr. 382; Pratt v. Radford, 8 N. W. Rep. 606; Cochrane v. Quackenbush, 13 N. W. Rep. 154.

§ 84. **Bills and notes.** Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument, or by a party thereto, to recover against other parties liable over to him, and persons liable severally for the same debt or demand, although upon different obligations or instruments, may all, or any of them, be included in the same action, at the option of the plaintiff.

Sec. 105; Wait, Code, 120; Harst. Pr. 383; Dederick v. Barber, 5 N. W. Rep. 1064.

§ 85. **Action does not abate.** No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law. At any time after the death or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

Secs. 88, 562; Wait, Code, 121; Harst. Pr. 385; Golden Terra Mining Co. v. Smith, 11 N. W. Rep. 97.

§ 86. **Successor may revive judgment.** Where judgment has heretofore or shall hereafter be recovered for the possession of real property, and the party recovering such judgment shall have died subsequent to the recovery thereof, his successor in interest in said real property, whether by grant, devise, or inheritance, may revive said judgment and enforce the same by execution, on motion, within one year after said death, or afterwards on supplemental complaint.

Sec. 87; Wait, Code, 121.

§ 87. **Non-resident intestate.** When an intestate not being an inhabitant of the territory shall die out of the territory, not leaving assets therein, and there shall be pending in the supreme court an appeal brought by such intestate from a judgment against him, the court in which such appeal is pending may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on said appeal procure such action to be revived within six months after notice to perfect such appeal by the substitution of a representative in said action.

Sec. 86; Wait, Code, 121.

§ 88. **Death of one of several parties.** Where one of two or more plaintiffs, or one of two or more defendants, in an action, dies, and only part of the cause of action, or of several distinct causes of action, survives to or against the others, the action may proceed without bringing in the person who has succeeded to the rights of the deceased party; and the judgment shall not affect him or his interest in the subject of the action. But the court may order such successor of a deceased party, or any person who claims to be such successor, to be brought in as a party, either plaintiff or defendant, whenever it appears proper to do so, upon his own application or upon the application of any party to the action, and, if necessary, that supplemental pleadings be put in. The defendant, or surviving defendant, in the action may proceed against such successor, in the same manner as a plaintiff, to bring him in and have his rights settled by judgment.

Secs. 85, 87, 294, 562; Wait, Code, 121; King v. Bell, 14 N. W. Rep. 141.

§ 89. **Power of court—interpleader.** The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

Secs. 82, 83, 90, 91, 88; Wait, Code, 122; Harst. Pr. 389.

§ 90. **Intervention, when.** Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.

Sec. 91; Wait, Code, 122; Harst. Pr. 387; Michigan & Ohio Plaster Co. v. White, 5 N. W. Rep. 1086; Lewis v. Harwood, 28 Minn. 428; Mann v. Flower, 5 N W. Rep. 365; Wetmore v. McMillan, 10 N. W. Rep. 725; Mower's Appeal, 12 N. W. Rep. 646; Howe v. Jones, 10 N. W. Rep. 299.

§ 91. **Interpleader.** A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.

Sec. 89; Wait, Code, 122; Harst. Pr. 386; Michigan & Ohio Plaster Co. v. White, 5 N. W. Rep. 1086; Moore v. Barnheisel, 8 N. W. Rep. 531.

CHAPTER VIII.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 92. **Where subject-matter is.** Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by statute:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property distrained for any cause.

Sec. 616; Wait, Code, 123; Harst. Pr. 392.

§ 93. **Where the cause arose.** Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute, except that, when it is imposed for an offense committed on a lake or river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or his aid, shall do anything touching the duties of such officer.

Wait, Code, 124; Harst. Pr. 393.

§ 94. That in all other cases the action shall be tried in the judicial subdivision in which the defendant or defendants, or any of them shall reside, or may be served, at the commencement of the action; or, if none of the defendants shall reside in the territory, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial in the cases provided by statute. (*As amended March 5, 1881.*)

Wait, Code, 125; Harst. Pr. 395.

§ 95. **Defendant must ask change—court may change.** If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as provided in this section. The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

Wait, Code, 126; Harst. Pr. 396, 397; Allen v. Coates, 11 N. W. Rep. 132; Michaels v. Crabtree, 13 N. W. Rep. 752; Bennett v. Carey, 10 N. W. Rep. 634.

CHAPTER IX.

MANNER OF COMMENCING CIVIL ACTIONS.

§ 96. **By summons.** Civil actions in the courts of this territory shall be commenced by the service of a summons.

Sec. 197; Wait, Code, 127; Harst. Pr. 405.

§ 97. **Requisites of same.** The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the territory, to be therein specified, in which there is a post-office, within thirty days after the service of the summons, exclusive of the day of service.

Secs. 98, 427; Wait, Code, 128; Harst. Pr. 407.
Time, for answering. Secs. 112, 115, 99.
" how computed. Sec. 6.
" may be extended, how. Secs. 143, 512.
" for answering amended complaint. Sec. 115.

It is not a fatal defect in a summons that it is styled "State of Wisconsin," instead of "The State," etc. Mabbett v. Vick, 10 N. W. Rep. 84. Summons not void for being issued on a legal holiday. Smith v. Ihling, 11 N. W. Rep. 408.

Error in the name of the defendant in the summons held fatal. Atwood v. Landis, 22 Minn. 558.

In action of partition, what is sufficient. Martin v. Parker, 14 Minn. (Gil.) 1. Summons subscribed by a third person for the plaintiff, and in his presence, good. Hotchkiss v. Cutting, 14 Minn. (Gil.) 408.

Signature must be written, not printed. 9 Minn. (Gil.) 206. Held otherwise in Wisconsin. Mezchen v. More, 11 N. W. Rep. 534.

A summons issued in blank and filled up by another is void. Craighead v. Martin, 25 Minn. 41.

In action of bastardy, clerk signs summons. Sec. 739.

Appearance waives defects in summons. Sec. 108; Hinkley v. St. Anthony Falls W. P. Co. 9 Minn. (Gil.) 44.

§ 98. **Notice required in.** The plaintiff shall also insert in the summons a notice, in substance, as follows:

1. In action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein if the defendant fail to answer the complaint in thirty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within thirty days after the service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

Sec. 229; Wait, Code, 129; Harst. Pr. 407. Service of summons. Sec. 102; Roggenkamp v. Moore, 2 N. W. Rep. 227; Id. 345; Hotchkiss v. Cutting, 14 Minn. (Gil.) 408; Whitt v. Iltis, 24 Minn. 43.

§ 99. **Service of complaint.** A copy of the complaint need not be served with the summons. In such case the summons must state where the complaint is or will be filed; and if the defendant, within thirty days thereafter, cause notice of appearance to be given, and, in person or by attorney, demand in writing a copy of the complaint, specifying a place within the territory where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly, and after such service the defendant has thirty days to answer, but only one copy need be served on the same attorney.

Wait, Code, 130; Harst. Pr. 410.

§ 100. **Notice of no personal claim.** In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real, or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering he shall, in writing, demand the same. If a defendant on whom such notice is served unreasonably defend the action, he shall pay costs to the plaintiff.

Wait, Code, 131.

§ 101. **Lis pendens—effect of.** In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any other time afterwards, or whenever a warrant of attachment of property shall be issued, or at any time afterwards, the plaintiff, or a defendant when he sets up an affirmative cause of action in his answer, and demands substantive relief, at the time of filing his answer or at any time afterwards, if the same be intended to affect real property, may file with the register of deeds of each county in which the real property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the real property in that county affected thereby; but if the action be for the foreclosure of a mortgage, no such notice need be filed. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: *provided, however*, that such notice shall be of no avail unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing.

And the court in which the said action was commenced, may, in its discretion, at any time, after the action shall be settled, discontinued, or abated, as is provided in section number eighty-five, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be canceled of record by the register of deeds of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which the register of deeds shall be entitled to a fee of twenty-five cents.

Sec. 551; Wait, Code, 132; Harst. Pr. 409.

§ 102. **Summons—how served.** The summons shall be served by delivering a copy thereof as follows:

1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein, or when such service shall be made within this territory personally upon the president, treasurer, secretary, or duly authorized agent thereof.

2. In an action against a railroad corporation, in addition to the service provided in subdivision 1 of this section, to any acting ticket, station, or freight agent of such railroad company in the county or subdivision where the action or proceeding is commenced.

3. If the action be against a public corporation within this territory, to the mayor or any of the aldermen of any city, to any of the commissioners of a county, to the president or any of the trustees of any incorporated town, to any of the supervisors of an organized township, to any of the members of a school-district board.

4. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian; or, if there be none within the territory, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

5. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a guardian has been appointed, to such guardian and to the defendant personally.

6. In all other cases, to the defendant personally; and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling-house, in the presence of one or more of the members of his family over the age of fourteen years; or, if the defendant reside in the family of another, with one of the members of the family in which he resides over the age of fourteen years.

Service made in any of the modes provided in this section shall be taken and held to be personal service; and all writs, process, or orders issued by any of the courts of this territory, or by the judges thereof, in any action or proceeding, shall be served in the manner and upon the persons or officers mentioned in this section, and none other, except in cases where service of papers can be made upon an attorney after appearance, as provided by the Code ot Civil Procedure. (*As amended February 21, 1881.*)

In partition. Sec. 552; Wait, Code, 134; Harst. Pr. 41; Prob. Code, § 311.

Complete jurisdiction is acquired only by the service of a summons in one of the modes prescribed by law, or by voluntary appearance. Waldron v. Ry. Co. 1 Dak. 351.

Return of service, proof of. Goener v. Woll, 2 N. W. Rep. 163; Gilbert v. Brown, 2 N. W. Rep. 376; Millette v. Mehmke, 3 N. W. Rep. 700; Reed v. Catlin, 6 N. W. Rep. 326; Masterson v. Le Claire, 4 Minn. (Gil.) 108; Tuller v. Caldwell, 3 Minn. (Gil.) 67; Guernseyv. Am. Ins. Co. 13 Minn. (Gil.) 256.

Service by publication. See remarks of SHANNON, J., 1 Dak. 500-506; Atkins v. Atkins, 2 N. W. Rep. 466; sec. 104.

Appearance, voluntary, waives all defects of service and the service itself. Sec. 108; Anderson v. Ry Co. 21 Minn. 30; Chouteau v. Rice, 1 Minn. (Gil.) 166.

§ 103. **By whom summons served.** The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an indorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

Provided, however, that whenever any summons or other process shall be served by any person other than a sheriff or his duly appointed deputy, no fees shall be allowed therefor, either for mileage in traveling or making such service, or for serving said summons or process.

§ 2. This act to apply only to Minnehaha, Bon Homme, Clay, Union, Yankton, and Lincoln counties, Dakota Territory. (*As amended March 9, 1883.*)

Service by sheriff. Sec. 524; Wait, Code, 133; Harst. Pr. 410.

Service by sheriff, how proved. Sec. 107.

§ 104. **By publication—cases and manner.** Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this territory, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases:

1. Where the defendant is a foreign corporation, has property within the territory, or the cause of action arose therein.

2. Where the defendant, being a resident of this territory, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

3. Where he is not a resident of this territory, but has property therein, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this territory, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

5. Where the action is for divorce or for a decree annulling a marriage.

The order must direct the publication to be made in some newspaper to be designated as most likely to give notice to the person to be served, and for such lengths of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the territory, is equivalent to publication and deposit in the post-office. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing. In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party or parties having any interest in or lien upon such mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, such court or justice may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week successively, in a newspaper printed in the county where the premises are situated, provided a paper be published in such county; and if no paper be published in the county, then in a paper published nearest the county seat of such county in the territory, which publication shall be equivalent to a personal service on such unknown party or parties.

Secs. 106, 107, 229, (3,) 553, 752; Wait, Code, 135; Harst. Pr. 412, 413.

Where the service is made by publication, strict compliance with the terms of the law is required to give the court jurisdiction. See remarks and opinion of SHANNON, J., in 1 Dak. 500, 506; Wescott v. Archer, 11 N. W. Rep. 491; Atkins v. Atkins, 2 N. W. Rep. 466; Mackubin v. Smith, 5 Minn. (Gil.) 296; Harrington v. Loomis, 10 Minn. (Gil.) 293; Beecher v. Stephens, 25 Minn. 146; Morey v. Morey, 27 Minn. 265.

When service by publication is complete. Sec. 106.

§ 105. **Joint and several debtors.** Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them, or any of them alone.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

Sec. 84; Wait, Code, 136; Harst. Pr. 414; Hinkley v. St. Anthony Falls Water-power Co. 9 Minn. (Gil.) 44.

§ 106. **When service complete.** In the cases mentioned in section 104, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

Sec. 104; Wait, Code, 137.

§ 107. **Proof of service—acceptance.** Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, as required by law if the same shall have been deposited; or,
4. The written admissions of the defendant.

In cases of service otherwise than by publication, the certificate, affidavit, or admission, must state the time, place, and manner of service.

Sec. 102, and references 467, 490, 611; Wait, Code, 138; Hart. Pr. 415, 2010.

Whether the service be made by the sheriff or by an unofficial person, the return must show when, where, and how it was made; and the return must show a substantial compliance with all the legal requirements to give the court jurisdiction of the party defendant. Newlove v. Woodward, 4 N. W. Rep. 237; Meyers v. Le Poidevin, 4 N. W. Rep. 319; Hall v. Graham, 5 N. W. Rep. 943; Michels v. Stork, 5 N. W. Rep. 1034; Kraft v. Roths, 7 N. W. Rep. 232; Holden v. Ranney, 8 N. W. Rep. 78; American Express Co. v. Conant, 8 N. W. Rep. 574.

Affidavit failing to state place of service is fatally defective. 9 N. W. Rep. 794.

Summons directed to sheriff of particular county cannot be served by unofficial person, unless appointed for that purpose by such sheriff. Railway Co. v. Sayer, 13 N. W. Rep. 404.

Validity of service contested, and held good. Goener v. Woll, 2 N. W. Rep. 163; Elliott v. Preston, 6 N. W. Rep. 238.

Service by acceptance.

The acceptance must be by the party himself, and not by proxy. Chapin v. Pinkerton, 12 N. W. Rep. 282. When the acceptance has been duly made, it must be proved as in other cases. Masterson v. Le Claire, 4 Minn. (Gil.) 108.

An acceptance of service is not an appearance. Bank of Hastings v. Rogers, 12 Minn. (Gil.) 437.

In Reed v. Catlin, 6 N. W. Rep. 326, the affidavit of service failed to specify the date of service; held supplied by the jurat, which did state the date.

In Townsend v. Smith, 3 N. W. Rep. 439, defendant had been induced, by fraudulent pretenses of plaintiff, to come within the jurisdiction of the court, and while there was personally served with the summons; held bad and set aside.

In Mabbett v. Vick, 10 N. W. Rep. 84, an error in the return-day, by mistake, was held not fatal.

In Gilbert v. Brown, 2 N. W. Rep. 376, it was objected that the officer's return failed to show *in what county* the service was made; held, that it would be presumed that the officer summoned the person in the county for which he (the officer) was elected.

In Millette v. Mehmke, 3 N. W. Rep. 700, the summons was served with a copy of the complaint, but instead of referring to such copy as that which defendant was required to answer, the summons required him to answer the complaint which had been filed in the office of the clerk, etc. No complaint was filed. Held not to invalidate the service of the summons; an irregularity, the defendant's remedy for which is by motion in the court below to set aside the service.

In case of corporations. Dewey v. Central Car Co. 4 N. W. Rep. 179; Sullivan v. La Crosse & M. Steam Packet Co. 10 Minn. (Gil.) 308; Guernsey v. Am. Ins Co. 13 Minn. (Gil.) 256.

Sheriff refusing to make return of service—remedy. Heyman v. Cunningham, 8 N. W. Rep. 401.

Proof of service by publication. Sec. 104 and notes; Auerbach v. Maynard, 4 N. W. Rep. 816; Morey v. Morey, 6 N. W. Rep. 783; Soule v. Hough, 8 N. W. Rep. 50; Flint v. Gurrell, 11 N. W. Rep. 431; Messelroad v. Parrish, 3 N. W. Rep. 45; 6 N. W. Rep. 186; Harrington v. Loomis, 10 Minn. (Gil.) 293; Atkins v. Atkins, 2 N. W. Rep. 466; Broome v. Packet Co. 9 Minn. (Gil.) 225; Cleland v. Tavernier, 11 Minn. (Gil.) 126; Beecher v. Stephens, 25 Minn. 146; Pratt v. Tinkcom, 21 Minn. 142.

§ 108. **Jurisdiction—appearance.** From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Wait, Code, 139; Harst. Pr. 416; Waldron v. Ry. Co. 1 Dak. 351; Id. 372 and 38; Egan v. Sengfeil, 1 N. W. Rep. 467, (Wis.); 3 N. W. Rep. 831.

A special appearance to object to the jurisdiction of the court does not waive service of summons. Newlove v. Woodward, 4 N. W. Rep. 237; 5 N. W. Rep. 1034; Schwab v. Mabley, 11 N. W. Rep. 294.

Appearance entitles party to usual notices. Sec. 519; Bank of Hastings v. Rogers, 12 Minn. (Gil.) 437.

Jurisdiction is acquired by publication only when the full term of publication has expired. Sec. 106.

CHAPTER X.

OF PLEADINGS IN CIVIL ACTIONS.

THE COMPLAINT.

§ 109. **Forms abolished.** All forms of pleading heretofore existing are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act.

Wait, Code, 140; Harst. Pr. 421.

§ 110. **Complaint.** The first pleading on the part of the plaintiff is the complaint.

Wait, Code, 141; Harst. Pr. 425.

§ 111. **What to contain.** The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of county in which the plain-

tiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

Wait, Code, 142; Harst. Pr. 426; sec. 406.

Pleadings are to be construed liberally. Sec. 128.

The title to the action is a part of the complaint, and when the names of the parties are fully set out in the title, it is not necessary to repeat them in the subsequent parts of the complaint. Stubendorf v. Sonnenschein, 9 N. W. Rep. 91; Fanning v. Krapfl, 14 N. W. Rep. 727; Knox v. Starks, 4 Minn. (Gil.) 7; Bidwell v. Coleman, 11 Minn. (Gil.) 45.

When several plaintiffs sue jointly they should allege *the capacity* in which they sue; whether as a copartnership or corporation. Sweet v. Ervin, 6 N. W. Rep. 156; 13 Minn. (Gil.) 50.

"Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred and set forth according to its legal effect and operation, and *not the evidence* of those facts; *nor arguments, nor inferences, nor matters of law only.*" Clay County v. Simonson, 1 Dak. 430; Bell v. Sherer, 11 N. W. Rep. 861; Clark v. Ry. Co. 28 Minn. 69; 28 Minn. 367; 12 N. W. Rep. 484; 13 N. W. Rep. 508. Nor should the complaint, by any allegation, anticipate the defense. Amer. Button-hole Co. v. Moore, (Dak.) 8 N. W. Rep. 131; 9 N. W. Rep. 17; Hocum v. Weitherick, 22 Minn. 152; Gray v. Ry. Co. 13 Minn. (Gil.) 289; Amos v. Fond du Lac, 1 N.W. Rep. 346; Whittier v. Ry. Co. 24 Minn. 394.

Complaint should set forth only such facts as are material to plaintiff's cause of action. Sec. 129; Rollins v. St. P. Lumber Co. 21 Minn. 5; 13 Minn. 362.

The allegations of the complaint should be positive. Taylor v. Blake, 11 Minn. (Gil.) 170. And not in the alternative. City of St. Paul v. Marvin, 16 Minn. (Gil.) 91. Specific allegations control general. 1 N. W. Rep. 338.

Defective complaint is sometimes cured by the answer. Rollins v. St. Paul Lumber Co. 21 Minn. 5. But see 10 N. W. Rep. 264; Warner v. Lockerby, 28 Minn. 28. Also by evidence without objection. Frank v. Irgens, 27 Minn. 43. But not by verdict. Lee v. Emery, 10 Minn. (Gil.) 151. See Hurd v. Simonton, 10 Minn. (Gil.) 340.

Illustrative cases in which the sufficiency or insufficiency of the complaint has been adjudged by different courts. 2 N. W. Rep. 283, 346. Injunction. 3 N. W. Rep. 488, 698, 818, 589. Action for damages against assignee. 4 N. W. Rep. 1, 19, 41, 44, 325, 805; 5 N. W. Rep. 471, 474, 666, 940; 6 N. W. Rep. 439, 715; 8 N. W. Rep. 131, 879; 9 N. W. Rep. 17, 448; 10 N. W. Rep. 264, 310, 139, 524, 586, 65; 11 N. W. Rep. 117, 891, 750; 12 N. W. Rep. 42, 101, 276; 13 N. W. Rep. 644, 555.

Requisites of complaint in certain cases.

In action for damages. 1 N. W. Rep. 4, 485; 5 N. W. Rep. 666; 8 N. W. Rep. 292, 363; 10 N. W. Rep. 208; 21 Minn. 358, 362, 364. On undertaking. 2 N. W. Rep. 459; 3 N. W. Rep. 667.

As to joinder of several causes in the same complaint. See sec. 136 and references.

Account, how to be stated. Sec. 127.

Judgment, how to be stated. Sec. 130.

Conditions precedent, how to be stated. Sec. 131.

Private statute, how to be stated. Sec. 132.
Verification of complaint. Secs. 125, 126.
Service of complaint. Secs. 99, 104.
Complaint to be filed, when. Sec. 521.
To be subscribed by party or his attorney. Sec. 125.

Special provisions as to allegations to be made in complaint.

For usurpation of office. Sec. 536.
To foreclose a mortgage. Secs. 620, 637.
To partition estate. Sec. 549.
In action of libel or slander. Sec. 133.
In ejectment. Sec. 637.
To quiet title. Sec. 639.
Demand of complaint limits plaintiff's right to relief. Sec. 293.

THE DEMURRER.

§ 112. **Defendant may demur or answer.** The only pleading on the part of defendant is either a demurrer or an answer. It must be served within thirty days after the service of the copy of the complaint.

Sec. 99; Wait, Code, 143.
Time for answering may be extended by leave of the court. Sec. 143.
Time for answering amended complaint is the same as for the original. Sec. 115.
Requisites of answer. Sec. 118.
When objections to complaint may be taken by answer. Sec. 116.
The delay for answering is computed by excluding the day on which the summons or complaint is served. Secs. 6, 97.
Failure to answer within the given delay authorizes plaintiff to take judgment. Sec. 229.
The answer must be served on the person and at the place indicated in the summons. Sec. 97.
Service to be made on attorney, when. Sec. 522.
How made on attorney. Sec. 514.
Service may be by mail. Secs. 515, 516, 517, 520.
May be made on clerk of court, when. Sec. 520.

§ 113. **When may demur.** The defendant may demur to the complaint when it shall appear upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties, for the same cause; or,
4. That there is a defect of parties, plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complainant does not state facts sufficient to constitute a cause of action.

Sec. 125; Wait, Code, 144; Harst. Pr. 430.
Demurrer to answer. Sec. 122.
Demurrer to reply. Sec. 124.

Time for filing demurrer. Secs. 112, 122.

Demurrer lies only on objections patent on the face of the pleading. Sec. 116; 9 N. W. Rep. 475.

Statute of limitations cannot be pleaded by demurrer. Sec. 37.

How pleaded. Sec. 114.

Demurrer admits only facts properly pleaded. Legal conclusions are not admitted. Bailey, Wood & Co. v. Landingham, 3 N. W. Rep. 460.

Joint general demurrer by several defendants, overruled as to one, is overruled as to all. Dunn v. Gibson, 4 N. W. Rep. 244; 12 N. W. Rep. 419. Missouri Valley Land Co. v. Bushnell, 8 N. W. Rep. 389.

A general demurrer will be overruled *in toto* if one count in the pleading is good, though another count may be demurrable. Bronson v. Markey, 10 N. W. Rep. 166; 11 N. W. Rep. 302. See, also, Arzbacher v. Mayer, 10 N. W. Rep. 440.

Demurrer is not the proper remedy to make pleadings more definite. Bishop v. Aldrich, (Wis.) 4 N. W. Rep. 775. Nor to change the venue. 13 N. W. Rep. 75; 9 N. W. Rep. 242.

On the argument of a demurrer to the answer defendant may attack the complaint on the ground that the court has not jurisdiction, or that complaint does not state facts sufficient to constitute a cause of action. 1 Dak. 403; sec. 117.

Demurrer must precede the plea to the merits. There cannot be an issue of fact (by answer) and an issue of law (demurrer) on the record at the same time in respect to the same matter. Cicotte v. Wayne Co. 6 N. W. Rep. 236.

Answer to the merits, without making objections to complaint, waives all defects and objections. Sec. 117. It is, however, in the discretion of the court to allow the defendant to withdraw his answer and file a demurrer to the complaint. Byington v. Stone, 1 N. W. Rep. 647; secs. 141, 143.

The general rule of liberal construction (sec. 128) of pleadings can only apply to affirmative pleadings, and implies disfavor to demurrer. Roe v. Lincoln Co. 13 N. W. Rep. 887; sec. 111 and notes; Sanborn v. Hale, 11 N. W. Rep. 302.

§ 114. **Requisites of demurrer.** The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Wait, Code, 145; Harst. Pr. 431.

A *general* demurrer to a complaint will not reach a special defect. The precise defect complained of must be specified and pointed out. Sanborn v. Hale, 11 N. W. Rep. 302; Nevil v. Clifford, 12 N. W. Rep. 419; Arzbacher v. Mayer, 10 N. W. Rep. 440; Kellogg v. Pearl, 5 N. W. Rep. 315; Moritz v. Splitt, 13 N. W. Rep. 555.

§ 115. **If complaint be amended.** If the complaint be amended a copy thereof must be served on the defendant, who must answer it within thirty days, or the plaintiff, upon filing with the clerk, on due proof of the service, and of the defendant's omission, may proceed to obtain judgment as provided by section two hundred and twenty-nine; but where an application to the court for judgment is necessary, ten days' notice thereof must be given to the defendant.

Wait, Code, 146; Harst. Pr. 432.

§ 116. **When answer.** When any of the matters enumerated in section one hundred and thirteen do not appear upon the face of the complaint, the objection may be taken by answer.

Wait, Code, 147; Harst. Pr. 433.

§ 117. **When objection waived.** If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Wait, Code, 148; Harst. Pr. 434. Clay Co. v. Simonsen, 1 Dak. 403; Id. 25; Kendig v. Overhulser, 12 N. W. Rep. 264; Donohue v. Hendrix, 13 N. W. Rep. 215.

THE ANSWER.

§ 118. **Requisites of answer.** The answer of the defendant must contain:

1. A general and specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief.
2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

Secs. 125, 134, 135, 117, 227, 429; Wait, Code, 149; Harst. Pr. 437

General denial.

A general denial puts at issue all the material allegations of the complaint, and entitles the defendant to negative, by competent evidence, any fact which the plaintiff is bound to prove in order to support his action. Richardson v. Steele, 4 N. W. Rep. 83; 6 N. W. Rep. 816; Phœnix Life Ins. Co. v. Walrath, 10 N. W. Rep. 151; Scott v. Morse, 7 N. W. Rep. 15; Ruth v. Ruth, 12 N. W. Rep. 108; Farmers' Mut. Ins. Co. v. Crampton, 5 N. W. Rep. 447; Lange v. Hook, 7 N. W. Rep. 839; Delany v. Cuming, 8 N. W. Rep. 897; Dale v. Hunneman, 10 N. W. Rep. 711; Bruley v. Rose, 11 N. W. Rep. 629; Kendig v. Overhulser, 12 N. W. Rep. 264; Montrose v. Williams, 13 N. W. Rep. 823; Dale v. Burleigh, 1 Dak. 227; Caldwell v. Bruggerman, 4 Minn. (Gil.) 190. But a general denial of value admits amount alleged. Moulton v. Thompson, 1 N. W. Rep. 836; Coleman v. O'Neil, 1 N. W. Rep. 846; Lillie v. McMillan, 3 N. W. Rep. 601. And a general denial against a corporation plaintiff does not put in issue the plaintiff's corporate existence, nor its capacity to sue. National Life Ins. Co. v. Robinson, 1 N. W. Rep. 124; Dietrich v. Ry. Co. 13 N. W. Rep. 13. Nor does a denial of "knowledge sufficient to form a belief," impose such necessity. First Nat. Bank of Rock Island v. Loyhed, 10 N. W. Rep. 421; Crane Bros. v. Morse, 5 N. W. Rep. 815. Nor does a general denial cover allegations in an amended complaint subsequently filed. Kelly v. Bliss, 11 N. W. Rep. 488; nor the appointment of a guardian *ad litem*. Schuek v. Hagar, 24 Minn. 339.

Answer held insufficient.

Payne v. Hill, 1 N. W. Rep. 235; Smith v. Ehuert, 3 N. W. Rep. 26; Union Lumbering Co. v. Supervisors of Chippewa County, 2 N. W. Rep. 281; Crane Bros. v. Morse, 5 N. W. Rep. 815; Rodifer v. Myers, 9 N. W. Rep. 186; Collins v. Singer Manuf'g Co. 10 N. W. Rep. 477.

The answer must be specific and definite. Sec. 129; Rodifer v. Myers, 9 N. W. Rep. 186; Lampsen v. Brander, 11 N. W. Rep. 94; Collins v. Singer Manuf'g Co. 10 N. W. Rep. 477.

And must state all the facts relied on. Bell v. Dangerfield, 3 N. W. Rep. 698; 8 N. W. Rep. 515; Blazier v. Johnson; 9 N. W. Rep. 543.

Special matters of defense must be specially pleaded. Abatement. 2 N.

W. Rep. 1123; 6 N. W. Rep. 816; Reif v. Paige, 13 N. W. Rep. 473, 781, 822; 1 N. W. Rep. 106.

Barred by statute.

Hooker v. Green, 6 N. W. Rep. 816, 885; Brush v. Peterson, 6 N. W. Rep. 287; 10 N. W. Rep. 425. By judgment. Beck v. Deveraux, 2 N. W. Rep. 365. Judgment of non-suit is no bar. Gummer v. Trustees of Village of Omro, 6 N. W. Rep. 885.

Counter-claim.

Dale v. Hunneman, 10 N. W. Rep. 711, 436, 623; 4 N. W. Rep. 106; Voechting v. Grau, 13 N. W. Rep. 230; Weatherby v. Mickeljohn, 13 N. W. Rep. 697; Sylte v. Nelson, 1 N. W. Rep. 811; Reynolds v. Martin, 1 N. W. Rep. 620; Goebel v. Hough, 2 N. W. Rep. 847; Robbins v. Brooks, 3 N. W. Rep. 256; 4 N. W. Rep. 192, 306; Findley v. Horner, 4 N. W. Rep. 86, 185, 752; Selleck v. Griswold, 5 N. W. Rep. 213, 699; 7 N. W. Rep. 57; Sigler v. Hidy, 9 N. W. Rep. 375; Ins. Co. v. Walrath, 10 N. W. Rep. 151, 623, 629; 11 N. W. Rep. 409, 513, 631; Heckman v. Swartz, 12 N. W. Rep. 439; Joseph v. Carter, 12 N. W. Rep. 876; Griffin v. Jorgenson, 22 Minn. 92; 21 Minn. 225, 366, 431.

Estoppel.

Must be pleaded. Parliman v. Young, (Dak.) 4 N. W. Rep. 143; (but see, *contra*, Coleman v. O'Neal, 1 N. W. Rep. 846;) Warder v. Baldwin, 8 N. W. Rep. 257, 897, 906; Folsom v. Fast Freight Line, (Iowa,) 6 N. W. Rep. 702.

Exemption from liability to seizure and execution.

Keegan v. Peterson, 24 Minn. 1.

Discharge in bankruptcy.

Benedict v. Smith, 12 N. W. Rep. 866.

Conditions precedent.

Sec. 131; Wheeler v. Teetzlaff, 10 N. W. Rep. 155.

Infancy.

Terry v. McClintock, 2 N. W. Rep. 787; Conrad v. Lane, 4 N. W. Rep. 695; 7 N. W. Rep. 496, 772.

Lis pendens.

Drea v. Cariveau, 9 N. W. Rep. 802; 12 N. W. Rep. 201.

Limitations. Sec. 37.

Payment. Esch v. Hardy, 22 Minn. 65; 12 N. W. Rep. 81.

Statute of frauds. Creswell v. McCaig, 9 N. W. Rep. 52.

Usury.

Bank v. Eyre, 2 N. W. Rep. 995, 339; Hart v. Wills, Id. 619; 4 N. W. Rep. 51; Bank v. Scott, 4 N. W. Rep. 314; Loan Association v. Heider, 5 N. W. Rep. 578.

Miscellaneous defenses.

4 N. W. Rep. 106; 6 N. W. Rep. 427, 68, 702, 885; 7 N. W. Rep. 145; 8 N. N. W. Rep. 95, 268, 389; 9 N. W. Rep. 527; 10 N. W. Rep. 425, 623; 11 N. W. Rep. 639; 12 N. W. Rep. 736, 284, 680.

All the matters specified in section 113 as grounds for demurrer, may be pleaded in answer when the same are not patent on the face of the complaint. Sec. 116.

§ 119. **Requisites of counter-claim.** The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer in such a manner that they may be intelligently distinguished.

Secs. 123, 641–643; Wait, Code, 150; Harst. Pr. 438, 441.

§ 120. **Demurrer and answer.** The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

Wait, Code, 151.

§ 121. **Sham defenses.** Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the courts may, in their discretion, impose.

Sec. 230; Wait, Code, 152; Harst. Pr. 453; Elmore v. Hill, 1 N. W. Rep. 235; Crane v. Morse, 5 N. W. Rep. 815; Lerdall v. Ins. Co. 8 N. W. Rep. 280; Magdeberg v. Uihlein, 10 N. W. Rep. 363; Quinn v. Shortall, 12 N. W. Rep. 153, 460. See, also, 2 N. W. Rep. 888; 4 N. W. Rep. 678; 9 N. W. Rep. 118; 1 N. W. Rep. 672; Peck v. Parchen, 2 N. W. Rep. 597; Dole v. Burleigh, 1 Dak. 227; Beggs v. Beggs, 7 N. W. Rep. 339; Sylte v. Nelson, 26 Minn. 105.

THE REPLY.

§ 122. **Reply, when—demurrer to answer.** When the answer contains new matter constituting a counter-claim the plaintiff may, within thirty days, reply to such new matter, denying, generally or specifically, each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defense, and the plaintiff may demur to one or more of such defenses or counter-claims, and reply to the residue of the counter-claims. And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and, in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

Secs. 137, 125, 126, 113, 114; Wait, Code, 153; Harst. Pr. 443, 444; Star Wagon Co. v. Matthiesen, 14 N. W. Rep. 107; Kirk v. Woodbury County, 7 N. W. Rep. 498; Craig v. Cook, 9 N. W. Rep. 712; Brownlee v. Marion County, 5 N. W. Rep. 610; Leyde v. Martin, 16 Minn. (Gil.) 24; 11 Minn. (Gil.) 70.

§ 123. **Judgment on answer.** If the answer contain a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may be issued.

Secs. 229, 292, 644; Wait, Code, 154.

§ 124. **Demurrer to reply.** If a reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

Sec. 113; Wait, Code, 155; Lockwood v. Bigelow, 11 Minn. (Gil.) 70.

GENERAL RULES OF PLEADING.

§ 125. **Subscribed—verification.** Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Sec. 431; Wait, Code, 156; Harst. Pr. 446.

§ 126. **Requisites of verification.** The verification must be to the effect that the same is true to the knowledge of the person making it, except as those matters stated on information and belief, and as to those matters he believes it to be true, and must be by the affidavit of the party, or, if there be several parties united in interest and pleading together, by one at least of such parties, acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not paid by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the territory, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.

Secs. 125, 431; Wait, Code, 157; Harst. Pr. 446; Chute v. Hozleton, 1 N. W. Rep. 672; Yow v. Nichols, Id. 664, 357; Fletcher v. Vandusen, 3 N. W. Rep. 488; Smith v. Mulliken, 2 Minn. (Gil.) 273; 4 N. W. Rep. 237; Kirst v. Wells, 1 N. W. Rep. 357.

§ 127. **Statement of account.** It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knoledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a "further account," when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

Wait, Code, 158; Harst. Pr. 454.

Demand for statement is not waived by answering to the merits. Peterson v. Tilden, 6 N. W. Rep. 217. Whether such demand operates as a stay of proceedings, *quære.* (Wis.) Egan v. Sengfeil, 1 N. W. Rep. 467; Packet Co. v. Platt, 22 Minn. 413; 13 Minn. (Gil.) 438; Mink v. Morrison, 4 N. W. Rep. 302; Claire v. Claire, Id. 411; Orr v. Leclaire, 12 N. W. Rep. 356.

§ 128. **Liberal construction.** In the construction of a pleading for the purpose of determining its effect, its allegation shall be liberally construed, with a view of substantial justice between the parties.

Wait, Code, 159; Harst. Pr. 452; Lange v. Hook, 7 N. W. Rep. 839; Haight v. Arnold, 12 N. W. Rep. 680, 101; Kelly v. Peterson, 2 N. W. Rep. 346; Merrill v. Merrill, 10 N. W. Rep. 684; Jordan v. Walker, 3 N. W. Rep. 679; Batterson v. Railway Co. 13 N. W. Rep. 508; Roe v. Lincoln County, 13 N. W. Rep. 887..

§ 129. **Making pleading definite.** If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

Secs. 135, 138, 139–146; Wait, Code, 160; Harst. Pr. 453; Bishop v. Aldrich, 4 N. W. Rep. 775; Crendson v. Middleton, 10 N. W. Rep. 679; Brandt v. Wilson, 12 N. W. Rep. 535; Batterson v. Grand Trunk Ry. Co. 13 N. W. Rep. 508; Webb v. Bidwell, 15 Minn. (Gil.) 394; Hewitt v. Brown, 21 Minn. 163; Id. 419. See, also, Brandt v. Wilson, 12 N. W. Rep. 535; Craig v. Cook, 9 N. W. Rep. 712.

§ 130. **Pleading a judgment.** In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

Wait, Code, 161; Harst. Pr. 456; Coon Tp. v. Directors Prov. Tp. 3 N. W. Rep. 109, 698, 818.

§ 131. **Conditions precedent.** In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims.

Wait, Code, 162; Harst. Pr. 457.

White v. Day, 9 N. W. Rep. 210; Andreas v. Holcombe, 22 Minn. 339; 1 N. W. Rep. 301; Dawson v. Shillock, 12 N. W. Rep. 526.

§ 132. **Private statute.** In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Wait, Code, 163; Harst. Pr. 459.

§ 133. **Libel or slander.** In an action for libel or slander, it shall not be necessary to state in the complaint any intrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Wait, Code, 164; Harst. Pr. 460; Stewart v. Wilson, 23 Minn. 449.

§ 134. **Same—defendant's answer.** In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and, whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

Wait, Code, 165; Harst. Pr. 461; Atkinson v. Free Press, 9 N. W. Rep. 501.

§ 135. **Answer of possession.** In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

Wait, Code, 166.

§ 136. **Joinder of actions—mortgages.** The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all rise out of:

1. The same transaction or transactions connected with the same subject of action.
2. Contract, express or implied; or,
3. Injuries, with or without force, to person and property, or either; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same, or for waste committed thereon; or,
6. Claims to recover personal property, with or without damages for the withholding thereof; or,
7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

Wait, Code, 167; Harst. Pr. 427.

(1) Gertler v. Linscott, 1 N. W. Rep. 579; Loan v. Hiney, 1 N. W. Rep. 587; Wilson v. Baker, 3 N. W. Rep. 481; Leidersdorff v. Bank, 7 N. W. Rep. 306; Wineland v. Cochran, 4 N. W. Rep. 67; Moon v. McKnight, 11 N. W. Rep. 800; Lees v. Wetmore, 12 N. W. Rep. 238; Froley v. Bentley, 1 Dak. 25; Ry. Co. v. Rice, 25 Minn. 278, 305; Winona & St. P. Ry. Co. v. St. P. & S. C. R. Co. 26 Minn. 179; Merrill v. Dearing, 22 Minn. 376; Lord v. Dearing, 24 Minn. 110.

(2) Thorpe v. Dickey, 2 N. W. Rep. 581, 365.

(3) Shanahan v. City of Madison, 15 N. W. Rep. 154.

(5) Sec. 644.

(6) Sec. 295.

(7) Winona v. St. P. Ry. Co. v. St. Paul & S. C. R. Co. 26 Minn. 179.

Action to foreclose mortgage. Sec. 619.

Misjoinder of causes—remedy. Wilson v. Baker, 3 N. W. Rep. 481.

§ 137. **Allegations—when deemed true or denied.** Every material allegation of the complaint not controverted by the answer, as prescribed in section one hundred and eighteen, and every material allegation of new matter in the answer constituting a counter-claim, not controverted by the reply, as prescribed in section one hundred and twenty-two, shall, for purposes of the action, be taken as true. But the allegation of new matter in the answer not relating to a counter-claim, or new matter in a reply, is to be deemed controverted by the adverse party, upon a direct denial or avoidance, as the case may require.

Secs. 117, 123, 229; Wait, Code, 168; Harst. Pr. 462.

The object of the Code is to compel the defendant to admit every part of the plaintiff's complaint which he cannot conscientiously deny. Dole v. Burleigh, 1 Dak. 227.

MISTAKES IN PLEADING AND AMENDMENTS.

§ 138. **Material and misleading.** No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually so misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been misled, the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

Secs. 129, 141, 142, 143, 144, 145; Wait, Code, 169; Harst. Pr. 469; Newhall House Stock Co. v. Ry. Co. 2 N. W. Rep. 1123; Stiller v. Ry. Co. 6 N. W. Rep. 303; Hastings v. Ingalls, 13 N. W. Rep. 403; Kopplekom v. Huffman, 10 N. W. Rep. 577; Blackman v. Wheaton, 13 Minn. (Gil.) 299.

§ 139. **If not material.** Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Wait, Code, 170; Harst, Pr. 470; 2 N. W. Rep. 1123; 3 N. W. Rep. 245, 618; 7 N. W. Rep. 57.

§ 140. **Failure to prove variance.** Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case at variance, within the last two sections, but a failure of proof.

Wait, Code, 171; Harst, Pr. 471; 12 N. W. Rep. 890; 13 N. W. Rep. 508, 386.

§ 141. **Amendments — when and how.** Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, and at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is or may be noticed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section one hundred and thirteen, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

Wait, Code, 172; Harst, Pr. 472; Crans v. Cunningham, 13 N. W. Rep. 176; Spencer v. Thistle, Id. 208.

§ 142. **Court may amend—terms.** The court may, before or after judgment, in furtherance of justice, and such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

Wait, Code, 173; Harst. Pr. 473; Crans v. Cunningham, 13 N. W. Rep. 176; Spencer v. Thistle, Id. 208.

§ 143. **Pleading after time.** The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, in like manner and upon like terms, permit an amendment of such proceedings so as to make it conformable thereto.

Wait, Code, 174; Harst. Pr. 473; sec. 512.

§ 144. **Unknown name.** When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated, in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Wait, Code, 175; Harst. Pr. 474; secs. 142, 752.

§ 145. **Trivial defects disregarded.** The court shall, in every stage of action, disregard an error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Wait, Code, 176; Harst. Pr. 475; 1 N. W. Rep. 4.

§ 146. **Supplemental pleading.** The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts, material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

Wait, Code, 177; Harst. Pr. 464.

CHAPTER XI.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

§ 147. **Classified.** The provisional remedies in civil actions are:

1. Arrest and bail.
2. Claim and delivery of personal property.
3. Injunction.
4. Attachment.
5. Receivers.
6. Deposit in court.

ARTICLE I.—ARREST AND BAIL.

§ 148. **Arrest limited—contempt.** No person shall be arrested in a civil action, except as prescribed by this Code; but this provision shall not apply to proceedings for contempt.

Wait, Code, 178; Harst. Pr. 478.

§ 149. **Cases when defendant arrested.** The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the territory, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or for property embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed or disposed of his property, or is about to do so, with the intent to defraud his creditors.

But no female shall be arrested in any action, except for a willful injury to person, character, or property.

Wait, Code, 179; Harst. Pr. 479; Supe v. Francis, 13 N. W. Rep. 584.

§ 150. **Where order obtained.** An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.

Wait, Code, 180; Harst. Pr. 480.

§ 151. **Basis of order.** The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section one hundred and forty-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed in the office of the clerk of the court.

Wait, Code, 181; Harst. Pr. 481; Maxwell v. Deens, 8 N. W. Rep. 561.

§ 152. **Undertaking from plaintiff.** Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the territory, and worth double the sum specified in the undertaking, over all his debts and liabilities, and exclusive of all property exempt from execution by the laws of this territory.

Wait, Code, 182; Harst. Pr. 482; Meddaugh v. Williams, 12 N. W. Rep. 34; Supe v. Francis, 13 N. W. Rep. 584.

§ 153. **When order issued and served.** The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and return the order, at a place and time therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or indorsed. But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.

Wait, Code, 183; Harst. Pr. 483.

§ 154. **Papers to defendant.** The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

Wait, Code, 184; Harst. Pr. 483.

§ 155. **Sheriff's duties—bail.** The sheriff must execute the order by arresting the defendant, and keeping him in custody until discharged by law, and may call the power of the county to his aid in the execution of the arrest, as in case of process. The defendant may give bail whenever arrested, at any hour of the day or night, and must have reasonable opportunity to procure it, before being committed to prison.

Wait, Code, 185; Harst. Pr. 485.

§ 156. **Discharge.** The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this article.

Wait, Code, 186; Harst. Pr. 486.

§ 157. **Bail, how given.** The defendant may give bail by causing a written undertaking, in the sum specified in the order of arrest, to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself answerable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment thereon, or if he be arrested for the cause mentioned in the the third subdivision of section one hundred and forty-nine, an undertaking to the same effect as that provided in section one hundred and eighty-one.

Wait, Code, 187; Harst. Pr. 487.

§ 158. **Surrender by bail.** At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner;

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody

thereon, as upon an order of arrest, and shall by a certificate in writing acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision three of section one hundred and forty-nine, so as to discharge the bail from an undertaking given to the effect provided by section one hundred and eighty-one.

Wait, Code, 188; Harst. Pr. 488.

§ 159. **Bail may arrest.** For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

Wait, Code, 189; Harst. Pr. 489.

§ 160. **Action against bail.** In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

Wait, Code, 190; Harst. Pr. 490.

§ 161. **Bail exonerated.** The bail may be exonerated either by the death of the defendant, or his imprisonment in a state or territorial prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

Wait, Code, 191; Harst. Pr. 491.

§ 162. **Plaintiff may except to bail.** Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

Wait, Code, 192; Harst. Pr. 492.

§ 163. **Justification.** On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, specifying the place of residence and occupation of the latter, before a judge of the court, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section one hundred and fifty-seven.

Wait, Code, 193; Harst. Pr. 493.

§ 164. **Requisites of bail.** The qualifications of bail must be as follows:

1. Each of them must be a resident and householder or freeholder within the territory.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Wait, Code, 194; Harst. Pr. 494.

§ 165. **Examination of bail.** For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Wait, Code, 195; Harst. Pr. 495.

§ 166. **Allowance of.** If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

Wait, Code, 196; Harst. Pr. 496.

§ 167. **Deposit—discharge.** The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

Wait, Code, 197; Harst. Pr. 497.

§ 168. **Payment into court.** The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff and the other to the defendant or his attorney. For any default in making such payment the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

Wait, Code, 198; Harst. Pr. 498.

§ 169. **Refunded on approved bail.** If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section one hundred and sixty-three, any time before judgment; thereupon the judge before whom the justification is had, shall direct in the order of allowance that the money deposited be refunded by the sheriff to defendant, and it shall be refunded accordingly.

Wait, Code, 199; Harst. Pr. 499.

§ 170. **Applied on judgment.** Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and, after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unpaid.

Wait, Code, 200; Harst. Pr. 500.

§ 171. **Sheriff's liability.** If, after being arrested, when there is a jail to which the defendant may be committed, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in sections one hundred and sixty-three, one hundred and sixty-four, one hundred and sixty-five, and one hundred and sixty-six, at any time before process against the person of the defendant to enforce an order or judgment in the action.

Wait, Code, 201; Harst. Pr. 501.

§ 172. **Judgment against sheriff.** If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

Wait, Code, 202; Harst. Pr. 502.

§ 173. **Bail liable to sheriff.** The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

Wait, Code, 203.

§ 174. **Motion to vacate arrest.** A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

Wait, Code, 204; Harst. Pr. 503.

§ 175. **Heard upon affidavit.** If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Wait, Code, 205; Harst. Pr. 503.

Arrest in execution of judgment. See secs. 309, 311.

Arrest for contempt. See secs. 209, 366, 376, 453, 454.

ARTICLE II.—CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 176. **When may claim.** The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this article.

Wait, Code, 206; Harst. Pr. 509.

Claim and delivery maintained. Heyman v. Covel, 6 N. W. Rep. 846; Williams v. Morgan, 7 N. W. Rep. 541; Hutchinson v. Dubois, 7 N. W. Rep. 714; Reavis v. Horner, 9 N. W. Rep. 643; Lufkin v. Preston, 10 N. W. Rep. 290; Magdeburgh v. Uihlein, 10 N. W. Rep. 363; Shroof v. Allen, 10 N. W. Rep. 551; Davis v. Gambert, Sheriff, 10 N. W. Rep. 658; Bradley v. Gamelle, 7 Minn. (Gil.) 260; Miller v. Darling, 22 Minn. 303; Sherman v. Clark, 24 Minn. 37; Bennett v. Schuster, 24 Minn. 383.

Claim and delivery not sustained. Ortman v. Campbell, 3 N. W. Rep. 223; Burt v. Burt, 1 N. W. Rep. 936; Susenbrenner v. Matthews, 3 N. W. Rep. 599; Goodman v. Kennedy, 4 N. W. Rep. 987; Knowlton v. Lendrum, Sheriff, 7 N. W. Rep. 97; Thompson v. Wedge, 7 N. W. Rep. 560; Libby v. Murray, 8 N. W. Rep. 238; Wheeler & Wilson v. Teetzlaff, 10 N. W. Rep. 155; Morrison v. Lumbord, 12 N. W. Rep. 696; Stratton v. Allen, 7 Minn. (Gil.) 409; Tozier v. Merriam, 12 Minn. (Gil.) 46; Berthold v. Holman, 12 Minn. (Gil.) 221; Davis v. Bayliss, 1 N. W. Rep. 697.

§ 177. **Plaintiff's affidavit.** Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.
2. That the property is wrongfully detained by the defendant.
3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief.
4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,
5. The actual value of the property.

Wait, Code, 207; Harst. Pr. 510; Crans v. Cunningham, 13 N. W. Rep. 176; Goodell v. Ward, 17 Minn. (Gil.) 1.

§ 178. **Requisition to sheriff.** The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

Wait, Code, 208; Harst. Pr. 511; Davis v. Bayliss, 1 N. W. Rep. 697.

§ 179. **Security by plaintiff.** Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall, also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Wait, Code, 209; Harst. Pr. 512; Burke v. Birchard, 1 N. W. Rep. 351; Green v. Kindy, 5 N. W. Rep. 297: Cahill's Appeal, 12 N. W. Rep. 877; Clark v. Norton, 6 Minn. (Gil.) 277; Buck v. Lewis, 9 Minn. (Gil.) 298; Robertson v. Davidson, 14 Minn. (Gil.) 422; Prichard v. Hopkins, 2 N. W. Rep. 1028.

§ 180. **Exceptions by defendant.** The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

Wait, Code, 210; Harst. Pr. 513; Vanderburgh v. Bassett, 4 Minn. (Gil.) 171; Cahill's Appeal, 12 N. W. Rep. 877.

§ 181. **Redelivery to defendant.** At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and eighty-six.

Wait, Code, 211; Harst. Pr. 514.

§ 182. **Justification.** The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace in the same manner as upon bail on arrest; upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Wait, Code, 212; Harst. Pr. 515.

§ 183. **Same.** The qualifications of sureties, and their justification, shall be as are prescribed by sections one hundred and sixty-four and one hundred and sixty-five, in respect to bail, upon an order of arrest.

Wait, Code, 213; Harst. Pr. 516.

§ 184. **Concealed property.** If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Wait, Code, 214; Harst. Pr. 517.

§ 185. **Keeping property.** When the sheriff shall have taken property, as in this article provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Wait, Code, 215; Harst. Pr. 518; Frey v. Drahos, 7 N. W. Rep. 319. See *ante*, sec. 176.

§ 186. **Claim by third persons.** If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Wait, Code, 216; Harst. Pr. 519; Stratton v. Allen, 7 Minn. (Gil.) 409; Dodge v. Chandler, 9 Minn. (Gil.) 87; Barry v. McGrade, 14 Minn. (Gil.) 126; Murphy v. Sherman, 25 Minn. 196; Taylor v. Hanscom, 8 N. W. Rep. 825.

Previous demand for delivery of possession necessary, when. Stratton v. Allen, 7 Minn. (Gil.) 409; Dodge v. Chandler, 9 Minn. (Gil.) 87; Barry v. McGrade, 14 Minn. (Gil.) 126; Murphy v. Sherman, 25 Minn. 196; Taylor v. Hanscom, 8 N. W. Rep. 825.

§ 187. **Papers filed with clerk.** The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Wait, Code, 217; Harst. Pr. 520.

ARTICLE III.—INJUNCTION.

§ 188. **Injunction by order.** The writ of injunction, as a provisional remedy, is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, in the cases provided in the next section, and, when made by a judge, may be enforced as the order of the court.

Wait, Code, 218; Harst. Pr. 525.

§ 189. **Cases when granted.** An injunction may be granted in either of the following cases:

1. It shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,
2. When, during the litigation, it shall appear that the defendant is doing, or threatens or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.
3. And when, during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

Secs. 372, 634; Wait, Code, 219; Harst. Pr. 526. See Civil Code, 2014–2017.

The granting or refusing an injunction rests in the sound discretion of the court. Wood v. Bangs, 1 Dak. 179; Fuson v. Life Ins. Co. 6 N. W. Rep. 7.

To sustain civil corporations. Cooper v. Detroit, 4 N. W. Rep. 262; Smith v. City of Oconomowoc, 6 N. W. Rep. 329; Harrington v. Town of Plainview, 6 N. W. Rep. 777; Stubenraugh v. Nerfenesch, 7 N. W. Rep. 1; Harrison v. Board of Supervisors, 8 N. W. Rep. 731; Upjohn v. Board of Health, 9 N. W.

Rep. 845; Torrent v. Muskegon, 10 N. W. Rep. 132; Ry. Co. v. Wisconsin, 10 N. W. Rep. 560; Warsop v. Hastings, 22 Minn. 437.

To restrain execution. Grattan v. Mattison, 2 N. W. Rep. 432; Patrick v. McCormick, 4 N. W. Rep. 312; Frey v. Drahos, 7 N. W. Rep. 319; Knox v. Randal, 24 Minn. 479.

In tax cases. Hunt v. Easterday, 4 N. W. Rep. 952; Sinclair v. County Com'rs, 23 Minn. 404; Clark v. Ganz, 21 Minn. 387; Scribner v. Allen, 12 Minn. (Gil.) 85.

In foreclosure cases. Sec. 634; Rynearson v. Fredenburg, 4 N. W. Rep. 187; Conkey v. Dike, 17 Minn. (Gil.) 434; Rogers v. Holyoke, 14 Minn. (Gil.) 158; Lash v. McCormick, 14 Minn. (Gil.) 359; Montgomery v. McEwen, 9 Minn. (Gil.) 93.

Miscellaneous cases resting in particular facts. City of Council Bluffs v. Stewart, 1 N. W. Rep. 628; Arnold v. Bright, 2 N. W. Rep. 16; Young v. Morgan, 2 N. W. Rep. 237; Morrill v. St. Anthony Falls Water-power Co. 2 N. W. Rep. 842; Joseph v. McGill, 2 N. W. Rep. 1007; Lamore v. Frisbie, 3 N. W. Rep. 910; Cole v. Cady, 3 N. W. Rep. 322; Kopmeier v. Larkin, 3 N. W. Rep. 373; Fletcher v. Vandusen, (sufficiency of complaint,) 3 N. W. Rep. 488; Barr v. Patrick, 3 N. W. Rep. 743; Mann v. Flower, 5 N. W. Rep. 365; Bank of Detroit v. Circuit Judge, 5 N. W. Rep. 627; Newcomb v. Nelson, 6 N. W. Rep. 526; Atkinson v. Hewitt, 8 N. W. Rep. 211; City of Burlington v. Cox, 8 N. W. Rep. 360; Hughes v. Eckerson, 8 N. W. Rep. 484; Starks v. Redfield, 9 N. W. Rep. 168; Shaw v. Chambers, 12 N. W. Rep. 486; Parks v. Burbank, 12 N. W. Rep. 729; Morgan v. Miller, 13 N. W. Rep. 643; Wickham v. Davis, 24 Minn. 167; Shaubut v. Ry. Co. 21 Minn. 502; Harrington v. Ry. Co. 17 Minn. (Gil.) 188; Id. 417.

To enjoin a ferry. McRoberts v. Washburn, 10 Minn. (Gil.) 8. To prevent the unauthorized obstruction of a street. Schurmeier v. Ry. Co. 10 Minn. (Gil.) 59.

§ 190. **Time — papers served.** The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactory to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Wait, Code, 220; Harst. Pr. 527; Fletcher v. Vandusen, 3 N. W. Rep. 488; sec. 126.

§ 191. **After answer.** An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Wait, Code, 221; Harst. Pr. 528.

§ 192. **Security—damages.** Where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

Wait, Code, 222; Harst. Pr. 529; Rynearson v. Fredenburg, 4 N. W. Rep. 187; Carroll Co. v. Iowa Ry. Land Co. 6 N. W. Rep. 69; Kimm v. Steketee, 7 N. W. Rep. 237.

§ 193. **Order to show cause.** If the court or judge deem it proper that the defendant, or any of the several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

Wait, Code, 223; Harst. Pr. 530.

§ 194. **Against corporation.** An injunction to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officer of the corporation, except when the territory is a party to the proceeding.

Wait, Code, 224; Harst. Pr. 531.

§ 195. **Application to vacate.** If the injunction be granted by a judge of the court without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

Wait, Code, 225; Harst. Pr. 532; Fletcher v. Vandusen, 3 N. W. Rep. 488; 4 N. W. Rep. 187; Fuson v. Ins. Co. 6 N. W. Rep. 7; Hughes v. Eckerson, 8 N. W. Rep. 484; Starks v. Redfield, 9 N. W. Rep. 168; Dalrymple v. Milwaukee, 10 N. W. Rep. 141; Dempster v. Oliver, Id. 275; Lewis v. Eshleman, 11 N. W. Rep. 617; Kelly v. Briggs, 12 N. W. Rep. 299; Small v. Summerville, Id. 315; Pinneo v. Heffelfinger, Id. 522; Johnson v. Railway Co. Id. 576; Lash v. McCormick, 14 Minn. (Gil.) 359.

§ 196. **Counter-affidavits.** If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavit or other proofs, in addition to those on which the injunction was granted.

Wait, Code, 226; Starks v. Redfield, 9 N. W. Rep. 168; Hart v. Baxter, 10 N. W. Rep. 198.

ARTICLE IV.—ATTACHMENT.

§ 197. **Property of non-residents, etc., may be attached.** In an action arising on contract for the recovery of money only; or in action for the wrongful conversion of personal property, against a corporation created by or under the laws of any other territory, state, government, or country; or against a defendant who is not a resident of this territory; or against a defendant who has absconded or concealed himself; or whenever any person or corporation is about to remove any of his or its property from this territory; or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors, as hereinafter mentioned,—the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this section an action shall be deemed commenced when the summons is issued: *Provided, however*, that personal service of such summons shall be made, or publication thereof commenced, within thirty days.

Provided, further, that whenever any debtor residing in this territory is about to remove from the county where he resides, with the intention of permanently changing his or her place of residence, it shall be lawful for his or her creditors to demand of such debtor security for such debt; and, in case of failure or neglect to secure the same, such creditor shall have the right of attachment against the property of such delinquent debtor under the provisions of law regulating attachment proceeding. (*As amended March 2, 1883.*)

Wait, Code, 227; Harst. Pr. 537.

Attachment is not an original process; and by it an action is not commenced, nor upon it alone can judgment be obtained. The action is commenced by summons, and the attachment is an adjunct. It is an order in an action for the arrest of the debtor's property, in the nature of bail, for the payment of such judgment as the plaintiff may obtain. It is a remedy that can be employed only in an action already commenced, and has no existence independent of the action in which it is obtained. Waldson v. Ry. Co. 1 Dak. 362; Heffner v. Gunz, 12 N. W. Rep. 342.

Attachment is a harsh remedy, in derogation of common right, and parties resorting to it will be held to a strict compliance with all the requirements of the law affecting it. Wiley v. Aultman, 11 N. W. Rep. 32.

Sufficient grounds for. Carey v. Gunnison, 1 N. W. Rep. 510; Warder v. Thrilkeld, 2 N. W. Rep. 1073; Gross v. Bunn, 4 N. W. Rep. 1048; 4 N. W. Rep. 1079. Levied on homestead. Liebetreau v. Hayward, 4 N. W. Rep. 813; 12 N. W. Rep. 830; Dent v. Smith, 5 N. W. Rep. 143. Wrongful, a conversion. Mohn v. Barton, 8 N. W. Rep. 765; Allerton v. Eldridge, 10 N. W. Rep. 252; Welch v. Jenks, 12 N. W. Rep. 727; Hilton v. Ross, 2 N. W. Rep. 862; Young v. Cooper, 12 N. W. Rep. 91.

§ 198. **Warrant issued by clerk—seal.** A warrant of attachment must be obtained from the clerk of the court in which the action is brought; and such warrant of attachment must be attested in the name of the presiding judge, and must be sealed with the seal of the court.

Wait, Code, 228; Harst. Pr. 538; Philpot v. Newman, 9 N. W. Rep. 94; Atkins v. Womeldorf, 4 N. W. Rep. 905; Magoon v. Gillett, 6 N. W. Rep. 131; Marston v. Hurlbut, 6 N. W. Rep. 316.

§ 199. **Affidavit—requisites.** The warrant may issue upon affidavit, stating:

1. That a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof; and,

2. That the defendant is either a foreign corporation or not a resident of this territory, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent, or that the debt was incurred from property obtained under false pretenses; or, (*as amended February 25, 1881,*)

3. That such corporation or person has removed, or is about to remove, any of his or its property from the territory with intent to defraud his or its creditors; or,

4. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with the like intent, whether such defendant be a resident of this territory or not.

Wait, Code, 229; Harst. Pr. 538; Carey v. Gunnison, 1 N. W. Rep. 510; Barber v. Smith, 1 N. W. Rep. 992; Miller v. Judge Circuit Court, 2 N.W. Rep. 26; Hilton v. Ross, 2 N. W. Rep. 862; Blanchard v. Brown, 3 N. W. Rep. 246; Auerbach v. Hitchcock, 9 N. W. Rep. 79.

Attachment of assigned goods. Lininger v. Raymond, 9 N. W. Rep. 550; Wiley v. Aultman, 11 N. W. Rep. 32; Id. 491; Lord v. Devendorf, 11 N. W. Rep. 903; Young v. Cooper, 12 N. W. Rep. 91; Id. 94; (amenable,) Lowenstein v. Monroe, 3 N. W. Rep. 51; Rasmussen v. McCabe, 1 N. W. Rep. 196; 8 N. W. Rep. 588; Prince v. Heenan, 5 Minn. (Gil.) 279, (affidavit in alternative.)

§ 200. **Plaintiff's undertaking.** Before issuing the warrant the clerk must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking, which must be at least the amount of the claim specified in the affidavit, and in no case less than two hundred and fifty dollars.

Wait, Code, 230; Harst. Pr. 539.

Undertaking not necessarily a part of the record. **Hilton v. Ross**, 2 N. W. Rep. 862; Bunt v. Rheum, 3 N. W. Rep. 667; Id. 246; Grafton v. Carmichael, 4 N. W. Rep. 1079; Nockles v. Eggspieler, 6 N. W. Rep. 67; Id. 77; Lowenstein v. Monroe, 7 N. W. Rep. 406.

§ 201. **Requisites of warrant.** The warrant must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

Wait, Code, 231; Harst. Pr. 540.

May be amended, how. Atkins v. Womeldorf, 4 N.W. Rep. 905. Amount not stated—amendment. Magoon v. Gillett, 6 N. W. Rep. 131; (defendant's bond,) Forrest v. O'Donnel, 4 N. W. Rep. 259; Rowley v. Jewett, 9 N.W. Rep. 353.

§ 202. **Execution of warrant.** The sheriff to whom such warrant of attachment is directed and delivered, must immediately attach all the real property of such debtor and all his personal estate, or so much thereof as may be sufficient to satisfy the plaintiff's demand, costs, and expenses, and including debts, credits, money, and bank notes, except property exempt from execution; and must take into his custody all books of accounts, vouchers, evidences of indebtedness, and all papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real property.

Wait, Code, 232; Harst. Pr. 542.

Defective service. Michels v. Stork, 5 N. W. Rep. 1034. Sheriff's return conclusive on him. Minnesota v. Penner, 6 N. W. Rep. 790. Obligation of sheriff in doubtful case. Wadsworth v. Walliker, 2 N. W. Rep. 420; Palmer v. Mason, 3 N. W. Rep. 945.

Seizure of homestead—attachment sustained. Liebetrau v. Goodsell, 4 N. W. Rep. 813; Gross v. Bunn, Id. 1048; Cobb v. Chase, 6 N. W. Rep. 300; Van Norman v. Circuit Judge, 7 N. W. Rep. 796; Richardson v. Rogers, 8 N. W. Rep. 526; Patch v. Wessels, 9 N. W. Rep. 269; Id. 473; Id. 550; Oswego Starch Factory v. Lendrum, 10 N. W. Rep. 900; Tucker v. Sanford, 11 N. W. Rep. 868; Chesney v. Francisco, 12 N. W. Rep. 94; Id. 830; Morris v. U. P. Ry. Co. 8 N. W. Rep. 804; Coots v. Radford, 10 N. W. Rep. 69; Green v. Cross, Id. 459; Civil Code, Dak. 1753, 1754; Allen v. Bullock, 1 N. W. Rep. 863.

For execution by garnishment, see secs. 207, 208.

§ 203. **Inventory—perishable property.** Immediately upon making such seizure he shall make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles and kinds of personal property, enumerating such of them as are perishable, and giving a description of the real property so attached, which inventory must be signed by the sheriff, attached to and made a part of the return on the warrant of attachment. And any subsequent execution of the warrant of attachment upon other property of the debtor must be made, and an inventory thereof made and returned in like manner.

Wait, Code, 232, 233; Harst. Pr. 546.

Perishable property may be sold summarily. Secs. 335, 205. Nor is the sale thereof stayed by appeal. Sec. 422.

§ 204. **Custody and collection of property.** The sheriff must keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action, and must, subject to the direction of the court or judge, collect and receive into his possession all debts, credits, and effects of the debtor. The sheriff may also take such legal proceedings, either in his own name or in the name of such debtor, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

Wait, Code, 232, 233; Wadsworth v. Walliker, 2 N. W. Rep. 420.

§ 205. **Perishable — sold under order.** If any of the property so seized shall be perishable, the sheriff must sell the same at public auction, under an order of the court, or a judge thereof, and must retain in his hands the proceeds of such sale, after deducting his expenses, which proceeds must be paid into court and there abide its further order.

Wait, Code, 232; Harst. Pr. 547; sec. 335.

§ 206. **Claimed property—sheriff's jury.** If any property so seized be claimed by or on behalf of any person other than such defendant, the sheriff may summon a jury and try the validity of such claim in the same manner with like effect as in case of seizure under execution.

Wait, Code, —; Harst. Pr. 549; Taylor v. Hanscom, 8 N.W. Rep. 825; Tuttle v. Wheaton, 10 N. W. Rep. 748.

§ 207. **Stocks and corporate interests.** The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this territory of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.

Wait, Code, 234; Harst. Pr. 541.

Attachment of bonds by garnishment. Warren v. Booth, 1 N. W. Rep. 502; Surplus of chattels pledged to secure a debt. Davis v. Wilson, 3 N. W. Rep. 52. Promissory note. Hirth v. Pfeifle, 3 N. W. Rep. 239. See Markham v. Farrell, Id. 262. Right of redemption. Becker v. Dunham, 6 N. W. Rep. 406. Of funds deposited by county treasurer. Bank v. Gandy, 9 N. W. Rep. 566. Of sum due by boarder on account of board. Singer v. Townsend, 10 N. W. Rep. 365. Of public funds deposited by township clerk in his own name. Long v. Emsley, 10 N. W. Rep. 280. Of pension money. Webb v. Holt, 11 N. W. Rep. 658. Of United States voucher. Leighton v. Heagerty, 21 Minn. 42. Of saw-logs in boom. 23 Minn. 475. But a claim due defendant and another jointly, cannot be reached by garnishment. Markham v. Farrell, 3 N. W. Rep. 262; Singer v. Townsend, 10 N. W. Rep. 365. Nor can a judgment, recovered before one justice of the peace, be garnished in proceedings before another justice. Sievers v. Woodburn Sarven Wheel Co. 5 N. W. Rep. 311; Wilson v. Bartholomew, 7 N. W. Rep. 227; White v. Custer, 13 N. W. Rep. 583. Nor rent not yet accrued. 4 N. W. Rep. 227. Nor can the transcript of justice's judgment (Mich.) form the basis of valid garnishee proceedings. 6 N. W. Rep. 858. Nor can money in the hands of assignee for distribution among creditors. 9 N. W. Rep. 211. Nor can a claim for damages for libel until the same is reduced to judgment. 9 N. W. Rep. 492. Nor can a contingent claim. Gies v. Bechtner, 12 Minn. (Gil.) 183.

§ 208. **Property incapable of delivery.** The execution of the attachment upon any such rights, shares, or any debts, or other property, incapable of manual delivery to the sheriff, must be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding or occupying such property, with a notice showing the property levied on; or, if the property attached be unoccupied real property, by putting a certified copy of such warrant upon the outer door of the court-house or other building in which the district court shall be held, within the county or judicial subdivision in which such unoccupied real property shall be situated.

Wait, Code, 235; Harst. Pr. 542–544.

Service on garnishee.

Mathews v. Smith, 12 N. W. Rep. 821; Hinkley v. St. Anthony Falls Water-power Co. 9 Minn. (Gil.) 44. By publication. Broome v. Packet Co. 9 Minn. (Gil.) 225; Kraft v. Roths, 9 N. W. Rep. 232.

Jurisdiction.

The court acquires jurisdiction over the garnishee only when it has jurisdiction of the principal debtor. Kraft v. Roths, 7 N. W. Rep. 232. Garnishment process on defective execution. Kentzler v. Ry. Co. 3 N. W. Rep. 369. Where garnishee owed nothing at the time of service, but did owe at time of answering, the court held that it acquired no jurisdiction. Morris v. U. P. Ry. Co. 8 N. W. Rep. 804.

Not subject to garnishment.

Assignee for benefit of creditors held not subject to garnishment process. Gimble v. Ferguson, 10 N. W. Rep. 789; Van Winkle v. Steel Fence Co. 9 N. W. Rep. 211. Nor is an executor or administrator before final order of distribution. Case Threshing-machine Co. v. Miracle, 11 N. W. Rep. 580. Nor is a civil corporation subject. Merrill v. Campbell, 5 N. W. Rep. 912. Crawford v. Eberly, 12 N. W. Rep. 96.

§ 209. **Certificate of defendant's interest.** Whenever the sheriff shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor, or individual for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuse to do so, or if it be made to appear by affidavit or otherwise, to the satisfaction of the court or judge thereof, that there is reason to suspect that any certificate given by him is untrue, or that it fails to fully set forth the facts required to be shown thereby, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

Wait, Code, 236; Harst. Pr. 543–545; Spears v. Chapman, 5 N. W. Rep.

1038; 6 N. W. Rep. 91; Lusk v. Galloway, 8 N. W. Rep. 608; Walker v. Detroit Manuf'g Co. 13 N. W. Rep. 812.

May be required to appear personally for examination. Penn v. Pelan, 3 N. W. Rep. 540; Padden v. Moore, 12 N. W. Rep. 724, 433; Thompson v. Silvers, 13 N. W. Rep. 854.

Judgment against the garnishee.

No judgment can properly be taken against the garnishee until after a valid judgment against the principal debtor. O'Rourke v. Ry. Co. 7 N. W. Rep. 582; 7 N. W. Rep. 232; 7 N. W. Rep. 191. Nor can judgment be taken against garnishee until after due and legal notice. Padden v. Moore, 12 N. W. Rep. 724. See Troyer v. Sweitzer, 15 Minn. (Gil.) 187.

Garnishee may be relieved from judgment by default. Goodrich v. Hopkins, 10 Minn. (Gil.) 130.

Plaintiff may disprove answers of garnishee. Feary v. Cummings, 1 N. W. Rep. 946, and 6 N. W. Rep. 98; Donnelly v. O'Connor, 22 Minn. 309; Leighton v. Heagerty 21 Minn. 42. But see Chase v. North, 4 Minn. (Gil.) 288.

Answer of garnishee is not a pleading. Brainard v. Simmons, 12 N. W. Rep. 484.

When garnishee to be discharged—by judgment. Dolby v. Tingley, 2 N. W. Rep. 866; 3 N. W. Rep. 300; Noble v. Bates, 6 N. W. Rep. 237; Williams v. Ry. Co. 6 N. W. Rep. 445; Blake v. Hubbard, 7 N. W. Rep. 204; Miller v. Hitchcock, 12 N. W. Rep. 871; Troyer v. Sweitzer, 15 Minn. (Gil.) 187.

§ 210. **Judgment—how satisfied.** In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages, at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debts that may have been seized or attached under the warrant of attach-

ment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment. At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect evidences of debts in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant, or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to the service of the notice and the time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

Wait, Code, 237; Harst. Pr. 550, 551. See execution of judgment. Secs. 306–376.

§ 211. **Plaintiff may prosecute actions—undertaking.** The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking, executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities, and exclusive of property exempt from execution.

Wait, Code, 238.

§ 212. **Delivery to defendant.** If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

Wait, Code, 239.

§ 213. **Defendant may apply for discharge.** Whenever the defendant shall have appeared in such action, he may apply to the clerk who issued the attachment, or to the court, for the discharge of the same; and, upon the discharge, all the proceeds of the sales and moneys collected by him, and all property attached remaining in his hands, must be delivered or paid by him to the defendant, or his agent, and released from the attachment. And when there is more than one defendant, and several property of either of the defendants has been seized by virtue of the warrant of attachment, the defendant whose several property has been seized may apply to the clerk who issued the warrant, or the court, for discharge of the attachment.

Wait, Code, 240; Harst. Pr. 554, 556.

Discharge of the attachment by delivery bond. Forrest v. O'Donnell, 4 N. W. Rep. 259; Rowley v. Jewett, 9 N. W. Rep. 353; Allerton v. Eldridge, 10 N. W. Rep. 252; Hilton v. Ross, 2 N. W. Rep. 862; Ripley v. Gear, 12 N. W. Rep. 480.

Defective affidavit. Wiley v. Aultman, 11 N. W. Rep. 32; Murphy v. Purdy, 13 Minn. (Gil.) 390; Ely v. Titus, 14 Minn. (Gil.) 93; Guile v. McNanny, 14 Minn. (Gil.) 391.

Defective bond. Olmsted v. Rivers, 2 N. W. Rep. 366.

For want of proper grounds. Hilton v. Ross, 2 N. W. Rep. 862; Davidson v. Hackett, 5 N. W. Rep. 459; Powers v. O'Brien, 6 N. W. Rep. 679; Allerton, v. Eldridge, 10 N. W. Rep. 252; Wiley v. Aultman, 11 N. W. Rep. 32; Lord v. Devendorf, 11 N. W. Rep. 903.

Attachment dissolved by bankruptcy proceedings. Tootle v. Sheldon, 4 N. W. Rep. 358; Coots v. Radford, 10 N. W. Rep. 69.

By appeal bond given. Bushey v. Raths, 7 N. W. Rep. 802.

Subsequent levies do not prevent attachment defendant from moving to dissolve former attachment. Schall v. Bly, 5 N. W. Rep. 651; Sheldon v. Stewart, 5 N. W. Rep. 1067.

Time for moving to vacate attachment. Hilton v. Ross, 2 N. W. Rep. 862; Bassett v. Hughes, 3 N. W. Rep. 770.

Question of invalidity of attachment will not be considered by supreme court when the question is for the first time raised in that court. Amer. Exp. Co. v. Crittenden, 10 N. W. Rep. 655.

§ 214. **Undertaking for discharge—plaintiff's exceptions.** Upon such application the defendant must deliver to the court or clerk an undertaking, executed by at least two sureties, who are residents and freeholders, or householders, in this territory, approved by such court or clerk, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which must be at least double the amount claimed by the plaintiff in his complaint. If it appear by affidavit that the property attached is worth less than the amount claimed by the plaintiff, the court, or the clerk issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And the plaintiff may, within three days after receiving written notice of the filing of such undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail so to do he shall be deemed to have waived all objection to them. When the plaintiff excepts, the sureties must justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, and may retain possession of the property attached, and the proceeds thereof in his hands, until the objection to them be either waived, as above provided, or until they justify, or new sureties are substituted and justify.

Wait, Code, 241; Harst. Pr. 555.

§ 215. **Proceedings in discharging attachment.** In all cases the defendant, or any person who has acquired a lien upon or interest in the defendant's property after it was attached, may move to discharge the attachment, if the motion be made upon affidavits on the part of the defendant, or person who has acquired a lien upon or interest in the defendant's property after it was attached, but not otherwise. The plaintiff may oppose the same by affidavit or other proof, in addition to the affidavit on which the attachment was granted, and in such case the defendant, or person who has acquired a lien upon or interest in the defendant's property after it was attached, may sustain the motion by affidavits or other proof in rebuttal of the affidavits or other proof offered and submitted on the part of the plaintiff to oppose the motion. And when there is more than one defendant, and several property of either of the defendants has been seized by virtue of the warrant of attachment, such defendant may deliver to the court or clerk an undertaking, in accordance with the provisions of the preceding section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant; and all the provisions of the preceding section relating to such undertaking apply thereto. (*As amended February 25, 1881.*)

Wait, Code, 241; Harst. Pr. 556, 557.

§ 216. **Partnership property—undertaking.** If a warrant of attachment be levied upon the interest of one or more partners in personal property of a partnership, the other partners, or any of them, may, at any time before judgment, apply to the court from which the warrant of attachment issued, or a judge thereof, upon affidavit stating such fact, for an order to discharge the attachment as to the partnership property. The applicant must give an undertaking, with at least two sufficient sureties, to the effect that, if judgment shall be rendered in the action in favor of the plaintiff, they will pay to the sheriff on demand the amount of defendant's interest in such partnership property; the amount of such interest to be determined by reference or otherwise, as the court may direct. The amount of such undertaking must be fixed by the court or judge thereof, and must not be less than the value of the interest of the defendant in the goods, chattels, credits, and effects of the partnership; and for the purpose of fixing the amount of the undertaking, the court or judge may hear affidavits or oral testimony, respecting the value of the defendant's interest in the attached property. If the plaintiff except to the sufficiency of the sureties, they must justify, on notice, in like manner as provided by section two hundred and fourteen.

§ 217. **Return by officer.** When the warrant shall be fully executed or discharged, the sheriff must return the same, with his proceedings thereon, to the court in which the action was brought.

Wait, Code, 242; Harst. Pr. 559; State of Minnesota v. Penner, 6 N. W. Rep. 790.

§ 218. **Action before claim due.** 1. When a debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or when the debt was incurred for property obtained under false pretenses; or, (*as amended February 25, 1881,*)

2. Is about to make sale, conveyance, or disposition of his property with such fraudulent intent; or,

3. Is about to remove his property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts;

—A creditor may bring an action on a claim before it is due, and have attachment against the property of the debtor; and the proceedings on such attachment shall be conducted in all respects as if the claim were due; but judgment must not be rendered in the action *under* [until] the debt or claim upon which such attachment is made and shall become due and payable.

Green v. Raymond, 2 N. W. Rep. 881; Rice v. Jerenson, 11 N. W. Rep. 549.

ARTICLE V.—OF RECEIVERS.

§ 219. **Cases when appointed.** A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In the cases where a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Wait. Code, 244; Harst. Pr. 564.

The receiver is an officer of the court, and performs all his duties under the orders of the court. Jennings v. Simpson, 11 N. W. Rep. 880; Roe v. Wilmot, 2 N. W. Rep. 539; secs. 223, 224.

Receiver cannot be appointed until an action is begun and pending. M. & M. N. Bank of Detroit v. Kent, 5 N. W. Rep. 627; Jones v. Schall, 8 N. W. Rep. 68.

Receiver cannot be appointed in vacation without notice. Howe v. Jones, 8 N. W. Rep. 451; Hazeltine v. Granger, 7 N. W. Rep. 74.

In actions of foreclosure. Schreiber v. Carey, 4 N. W. Rep. 124; Jacobs v. Gibson, 2 N. W. Rep. 893.

Appointment refused. Myton v. Davenport, 2 N. W. Rep. 402; Morris v. Branchaud, 8 N. W. Rep. 883; Silverman v. Kuhn, 5 N. W. Rep. 523; Radford v. Folsom, 12 N. W. Rep. 536.

In other cases. Hlawacek v. Bowman, 8 N. W. Rep. 102; Sleeper v. Iselin, 13 N. W. Rep. 341.

An order granting or refusing appointment is, in Michigan, appealable. Simon v. Schloss, 12 N. W. Rep. 196; Id. 202.

§ 220. **Receivers for corporation dissolved.** Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

Wait, Code, 244; Harst. Pr. 565; Snow v. Winslow, 6 N. W. Rep. 191; Tregaskis v. Judge, 11 N. W. Rep. 293.

§ 221. **Who may be receiver—undertaking by applicant.** No party or person interested in an action can be appointed receiver therein, without the written consent of the party, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver, and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

Wait, Code, 244; Harst. Pr. 566.

§ 222. **Qualification of receiver.** Before entering upon his duties the receiver must be sworn to perform them faithfully, and, with one or more sureties, approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Wait, Code, 244; Harst. Pr. 567.

§ 223. **Powers.** The receiver has, under the control of the court, power to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Wait, Code, 244; Harst. Pr. 568; Snow v. Winslow, 6 N. W. Rep. 191; sec. 373.

Receiver protected by orders of court. Holcombe v. Johnson, 7 N.W. Rep. 364.

§ 224. **Investment of funds on consent.** Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made except upon the consent of all the parties to the action.

Wait, Code, 244; Harst. Pr. 569.

ARTICLE VI.—OF DEPOSIT.

§ 225. **What subject to order of deposit.** When it is admitted by the pleadings or the examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further discretion of the court.

Wait, Code, 244; Harst. Pr. 572; secs. 91, 569, 422.

§ 226. **Disobedience—contempt.** Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it in conformity with the direction of the court.

Wait, Code, 244; Harst. Pr. 574.

§ 227. **Defendant's admissions.** When the answer of the defendant, expressly or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or a provisional remedy.

Wait, Code, 244; Harst. Pr. —.

CHAPTER XII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

ARTICLE I. — JUDGMENT UPON FAILURE TO ANSWER, ETC.

§ 228. **Judgment defined.** A judgment is the final determination of the rights of the parties in the action.

Wait, Code, 245; Harst. Pr. 577.

§ 229. **On failure to answer counter-claim—relief—published service—restitution.** Judgment may be had if the defendant fail to answer the complaint as follows:

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of section 99, and that no answer has been received. The court shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of the several defendants in the cases provided for in section 105; but if the complaint be not sworn to, and such action be on an instrument for the payment of money only, the court, on its production, shall assess the amount due to the plaintiff thereon, and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action from his examation, under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment. Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter-claim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment-roll.

2. In other actions the plaintiff may, upon the like proof, apply to the court, after the expiration of the time for answering, for the

relief demanded in the complaint. If the taking of an account, or of the proof of any fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose; and where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the territory, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

Wait, Code, 246; Harst. Pr. 585; secs. 115, 123, 270.

Judgment on default of answer. Kipp v. Fullerton, 4 Minn. (Gil.) 366; Granger v. Judge, 6 N. W. Rep. 848; Skillman v. Greenwood, 15 Minn. (Gil.) 77; Egan v. Sengfeil, 1 N. W. Rep. 467; Jewett v. Fink, 2 N. W. Rep. 1124; Naracong v. Graves, 1 N. W. Rep. 127; Lawrence v. Howell, 2 N. W. Rep. 617; Libby v. Mikkelburg, 8 N. W. Rep. 903.

The judgment is limited by the amount stated in the summons. Sec. 293; 13 N. W. Rep. 15.

On counter-claim. Sec. 123.

Service by publication—defendant's rights. McDonald v. McDonald, 7 N. W. Rep. 230; Mackubin v. Smith, 5 Minn. (Gil.) 296.

By confession. Secs. 715-717; Grattan v. Matteson, 6 N. W. Rep. 298.

Effect of. Thoreson v. Minneapolis Harvester Works, 13 N. W. Rep. 156. Union Lumbering Co. v. Chippewa Co. 2 N. W. Rep. 281.

§ 230. **On frivolous pleading.** If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court either in or out of the court for judgment thereon, and judgment may be given accordingly.

Wait, Code, 247. See sec. 121; Elmore v. Hill, 1 N. W. Rep. 235.

ARTICLE II.—ISSUES AND MODE OF TRIAL.

§ 231. **Origin and classes of issues.** Issues arise upon the pleading when a fact or conclusion of law is maintained by the one party, controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Wait, Code, 248; Harst. Pr. 588.

§ 232. **Issues of law.** An issue of law arises upon a demurrer to the complaint, answer, or reply; or to some part thereof.

Wait, Code, 249; Harst. Pr. 589.

§ 233. **Of fact classified.** An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

Wait, Code, 250; Harst. Pr. 590; Jordan v. Walker, 10 N. W. Rep. 232.

§ 234. **Both—order of trial.** Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

Wait, Code, 251.

§ 235. **Trial defined.** A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Wait, Code, 252.

§ 236. **By whom triable.** An issue of law must be tried by the court, unless it be referred as provided in sections 271 and 272. An issue of fact in an action for the recovery of money only, or of specific, real, or personal property, or for a divorce from the marriage contract, must be tried by a jury, unless a jury trial be waived, as provided in section 265, or a reference be ordered, as provided in section 272. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in section 272.

Wait, Code, 253, 254; Harst. Pr. 591, 592.

§ 237. **Single judge—when issues tried.** All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact must be tried at a regular term of the district court, when the trial is by jury, otherwise at a regular or special term, as the court may, by its rules, prescribe. Issues of law must be tried at a regular or special term of the district court; but the judge may try issues of law or fact, or both, in vacation, at any place within his district, upon the written consent of the parties, signed by them or their attorneys. (*As amended March 3, 1881.*)

Wait, Code, 255.

§ 238. **Note of issue—contents—order of trials.** At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to date of the issue. There need be but one notice of trial, and one note of issue from either party, and the action must then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

Stevens v. Curry, 10 Minn. (Gil.) 249; Wait, Code, 256, 257; Harst. Pr. 593.

§ 239. **Either party proceeds—separate trials.** Either party, when the case is reached upon the calendar, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict, or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will be promoted.

Wait, Code, 258; Harst. Pr. 581, 582, 594.

§ 240. **Who to furnish papers.** When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings, and the offer of the defendant, the same may be furnished by the defendant.

Wait, Code, 259.

ARTICLE III.—FORMATION OF THE TRIAL JURY.

§ 241. **Jury tickets.** At the opening of the court the clerk must prepare separate ballots containing the names of the persons returned as jurors, which must be folded as nearly alike as possible, and so that the names cannot be seen, and must deposit them in the trial jury-box.

Harst. Pr. 246.

§ 242. **Clerk to draw jury.** When the action is called for trial by jury, the clerk must draw from the trial jury-box of the court the ballots containing the names of the jurors summoned, until the jury is completed or the ballots are exhausted.

Harst. Pr. 246, 600.

When the ballots are exhausted before the panel is complete, the court may order jurors summoned to appear *instanter* to fill the panel. Pol. Code, Dak. *c.* 19, §§ 12, 13.

§ 243. **Challenges classed—by whom.** Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

Harst. Pr. 601.

§ 244. **For cause.** Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by the Political Code to render a person competent as a juror.

Pol. Code, Dak. *c.* 19, § 1.

2. Consanguinity or affinity, within the fourth degree, to either party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or being a partner in business with either party, or surety on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or some of them.

7. The existence of a state of mind in the juror evincing enmity against, or bias to or against, either party.

8. That he does not understand the English language as used in the courts.

Harst. Pr. 602.

Challenge to individual jurors. Sullings v. Shakespeare, 9 N. W. Rep. 451, 487, 698; State of Minn. v. Lawlor, Id. 698; State of Iowa v. Nelson, 12 N. W. Rep. 253; Morrison v. Lovejoy, 6 Minn. (Gil.) 224; Palmer v. Highway Com'rs, 12 N. W. Rep. 903.

Challenge to the array. Clark v. County Com'rs, 4 N. W. Rep. 246; Dayton v. Warren, 10 Minn. (Gil.) 185; Buford v. McGetchie, 14 N. W. Rep. 790; Gott v. Brigham, 8 N. W. Rep. 41.

§ 245. **Trial of same.** A challenge for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Harst. Pr. 603.

§ 246. **Oath to jurors.** As soon as the jury is completed, the following oath must be administered to the jurors:

"You, and each of you, do solemnly swear that you will well and truly try the matters in issue between ——— the plaintiff and ——— defendant, and a true verdict render according to the evidence. So help you God."

If any person be conscientiously scrupulous of taking an oath, he shall be allowed to make affirmation, substituting for the words "So help you God," at the end of the oath, the following: "This you do affirm under the pains and penalties of perjury."

Harst. Pr. 604.

The peculiar province of the jury is to find the facts of the case at issue, and report them to the court. Accordingly the jurors are made the sole judges of the credibility of witnesses, and of the weight of testimony. Territory v. Egan, 13 N. W. Rep. 568; Pool v. Ry. Co. 14 N. W. Rep. 46; Williams v. Ry. Co. Id. 97; Case v. Frederick, Id. 169. But a jury has no right to ignore testimony not discredited. Wood v. Barker, 13 N. W. Rep. 597.

Jury imperfectly organized. Wilson Sewing-machine Co. v. Bull, 3 N. W. Rep. 564.

ARTICLE IV.—OF THE CONDUCT OF THE TRIAL.

§ 247. **Order of trial.** When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part.
2. The defendant may then open his defense, and offer his evidence in support thereof.
3. The parties may then, respectively, offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.
4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.
5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the the evidence and argument.
6. The court may then charge the jury.

Harst. Pr. 607, 2042; Goodman v. Kennedy, 4 N. W. Rep. 987; Dent v. Smith, 5 N. W. Rep. 143.

§ 248. **Charge wholly written—giving and refusing.** The court, in charging the jury, shall only instruct as to the law of the case; and no judge shall instruct the petit jury in any case, civil, or criminal, unless such instructions are reduced to writing;

and when instructions are asked which the judge cannot give, he shall write on the margin thereof the word "refused," and such as he approves he shall write on the margin thereof the word "given;" and he shall, in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury, otherwise than in writing; and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same.

Harst. Pr. 608, 609.

The charge of the court should be in writing, and confined to the law applicable to the case. Caldwell v. Kennison, 4 Minn. (Gil.) 23 ; Derby v. Gallup, 5 Minn. (Gil.) 85 ; Search v. Miller, 1 N. W. Rep. 975 ; O'Connor v. Railroad Co. 27 Minn. 166. But the court may advise the jury as to character or weight of evidence. Kidd v. Fleek, 2 N. W. Rep. 1121 ; Buford v. McGetchie, 14 N. W. Rep. 790 : Corbin v. Sage, 6 N. W. Rep. 216 ; McArthur v. Craigie, 22 Minn. 351 ; Ames v. Cannon River Manuf'g Co. 27 Minn. 245.

Requests should be given or refused, as requested. The judge has no right to give them in a modified form. Galloway v. McLean, 9 N. W. Rep. 98 ; 1 Dak. 197, 379; Selden v. Bank of Commerce, 3 Minn. (Gil.) 108. But see Dodge v. Rogers, 9 Minn. (Gil.) 209 ; Chandler v. De Graff, 25 Minn. 88 ; State of Minnesota v. Mims, 26 Minn. 183.

Instructions based upon a state of facts of which there is no proof are erroneous. Clark v. Ralls, 12 N. W. Rep. 260; Ry. Co. v. Greve, 17 Minn. (Gil.) 299; Wilcox v. Ry. Co. 24 Minn. 269; City of Crete v. Childs, 9 N. W. Rep. 55.

A charge which assumes the existence of controverted facts is erroneous. Smith v. Dukes, 5 Minn. (Gil.) 301; Ry. Co. v. Greve, 17 Minn. (Gil.) 299; Chandler v. De Graff, 25 Minn. 88; Alden v. City of Minneapolis, 24 Minn. 254; Simpson v. Krumdick, 28 Minn. 352; Jones v. Town, 26 Minn. 172.

An instruction which ignores a controverted fact, or which withdraws the same from the jury, is properly refused. Requests not applicable to the issues of the case should be refused. Wilcox v. Railroad Co. 24 Minn. 269; Sanborn v. School-dist. 12 Minn. (Gil.) 1; Minnesota v. Staley, 14 Minn. (Gil.) 75; Marcotte v. Beaupre, 15 Minn. (Gil.) 117. Charges should be definite. Warner v. Myrick, 16 Minn. (Gil.) 81; Stearns v. Johnson, 17 Minn. (Gil.) 116; Johnson v. Wallower, 18 Minn. (Gil.) 262. And unambiguous. Horton v. Williams, 21 Minn. 187; Siebert v. Leonard, 21 Minn. 442; Erd v. City of St. Paul, 22 Minn. 443; Gardner v. Kellogg, 23 Minn. 463; McCormick v. Kelly, 28 Minn. 135. And not misleading. Shartle v. City of Minneapolis, 17 Minn. (Gil.) 284; Hocum v. Weitherick, 22 Minn. 152; Hayward v. Knapp, 23 Minn. 430.

When the instructions are plain and full they need not be repeated at the request of parties. State of Minnesota v. McCartey, 17 Minn. (Gil.) 54; O'Leary v. City of Mankato, 21 Minn. 65; State of Minnesota v. Mims, 26 Minn. 183; Wright v. Ames, 28 Minn. 362.

Presumptions in favor of the charge. Connolly v. Davidson, 15 Minn. (Gil.) 428; Id. 403; State of Minnesota v. Owens, 22 Minn. 238; Erd v. City St. Paul, 22 Minn. 443. Construction of charge. The whole charge must be taken together, and when, as a whole, it gives a full and correct statement of the law, an isolated part of it, which by itself might be considered erroneous, will not vitiate the charge as a whole. Woodruff v. King, 2 N. W. Rep. 452; Spencer v. Tozer, 15 Minn. (Gil.) 112; 1 N. W. Rep. 940.

§ 249. **Order of reading—by whom—jury to have—exceptions before judgment.** All instructions given by the judge shall be read to the jury in the following order:

1. Defendant's instructions by defendant's counsel.
2. Plaintiff's instructions by plaintiff's counsel.
3. Instructions given by the judge of his own motion, if any, by the judge giving the same; and all instructions so given and read shall be taken by the jury in their retirement, and returned into court with their verdict. Exceptions to the giving or refusing any instruction, or to its modification or change, may be taken at any time before the entry of final judgment in the case.

§ 250. **View by jury.** When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Harst. Pr. 610; Boardman v. Fire Ins. Co. 11 N. W. Rep. 417.

§ 251. **Admonitions to jury.** If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Harst. Pr. 611.

§ 252. **Papers jury may take.** Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

Harst. Pr. 612; Coit v. Waples, 1 Minn. (Gil.) 110; Millar v. Cuddy, 5 N. W. Rep. 316; State of Minnesota v. Nichols, 13 N. W. Rep. 153.

§ 253. **Conduct of the jury in retirement.** When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place, under charge of an officer, until they agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have ageed upon a verdict; and he must not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

Harst. Pr. 613; Webster Co. v. Hutchinson, 12 N. W. Rep. 534; State of Iowa v. Hessian, Id. 77; Snow v. Hardy, 3 Minn. (Gil.) 35; Ætna Ins. Co. v.

Grube, 6 Minn. (Gil.) 32; Hayward v. Knapp, 22 Minn. 5; Chalmers v. Whittemore, Id. 305; Hewitt v. Pioneer Press Co. 23 Minn. 178; Id. 291; Koehler v. Cleary, Id. 325; People v. Knapp, 3 N. W. Rep. 927.

§ 254. **Disagreement—information.** After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after the notice to, the parties or counsel.

Harst. Pr. 614; Woodruff v. King, 2 N. W. Rep. 452.

§ 255. **Sick juror discharged.** If, after the impaneling of a jury, and before a verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impaneled.

Harst. Pr. 615.

§ 256. **Prevented verdict—new trial.** In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

Harst. Pr. 616.

§ 257. **Sealed verdict—adjournment.** While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury.

Harst. Pr. 617.

§ 258. **Receiving verdict.** When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out.

Harst. Pr. 618; Kennedy v. Raught, 6 Minn. (Gil.) 155.

§ 259. **Correcting verdict.** When the verdict is announced, if it be informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

Harst. Pr. 619; Urbanck v. C., M. & St. P. Ry. Co. 1 N. W. Rep. 464; Blesch v. Ry. Co. 2 N. W. Rep. 113; Flannagan v. McWilliams, 2 N. W. Rep. 1062; Dana v. Farrington, 4 Minn. (Gil.) 335.

ARTICLE V.—OF THE VERDICT.

§ 260. **General and special verdict defined.** The verdict of a jury is either general or special:

1. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; and,
2. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

Wait, Code, 260; Harst. Pr. 624; Everett v. Buchanan, 6 N. W. Rep. 439; Holt v. Van Eps, 1 Dak. 207; Cotzhausen v. Simon, 1 N. W. Rep. 473; Uhlig v. Garrison, 2 N. W. Rep. 258.

§ 261. **When either—special when directed.** In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Wait, Code, 261, 262; Harst. Pr. 625; Everett v. Buchanan, 6 N. W. Rep. 439; Ryan v. Ins. Co. 1 N. W. Rep. 426; Darling v. West, Id. 531; Racine Basket Manuf'g Co. v. Koust, 7 N. W. Rep. 254; Cole v. Boyd, 10 N. W. Rep. 124; People v. Piper, 15 N. W. Rep. 523; Jaspers v. Lano, 17 Minn. (Gil.) 273; Goltz v. Railroad Co. 22 Minn. 55.

§ 262. **Jury to find amount—assessment.** When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter-claim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery; and they may also, under the direction of the court, assess the amount of the recovery, when the court gives judgment for the plaintiff on the answer.

Wait, Code, 263; Harst. Pr. 626; sec. 643; Fryberger v. Carney, 1 N. W. Rep. 807; Search v. Miller, Id. 975.

§ 263. **Must find value and damages.** In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Wait, Code, 261; Harst. Pr. 627. See secs. 262, 643, 700; Fryberger v. Carney, 1 N. W. Rep. 807; Search v. Miller, Id. 975; Eaton v. Caldwell, 3 Minn. (Gil.) 80.

§ 264. **Verdict and entries.** Upon receiving a verdict an entry must be made by the clerk in the minutes of the court, specifying time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where a special verdict is found, either the judgment rendered thereon, or, if the case be reserved for argument or further consideration, the order thus reserving it.

Wait, Code, 264; Harst. Pr. 628; State of Minnesota v. Levy, 24 Minn. 362.

The verdict must respond to all the issues submitted. Uhlig v. Garrison, 2 N. W. Rep. 258; Ward v. Busack, 1 N. W. Rep. 107; Alderman v. Manchester, 12 N. W. Rep. 905; Meighen v. Strong, 6 Minn. (Gil.) 111; Armstrong v. Hinds, 9 Minn. (Gil.) 341; Wisconsin River Lumber Co. v. Plumer, 6 N. W. Rep. 319; Eisley v. Malchow, 2 N. W. Rep. 372. The rule is well estab-

The rule is well established that the verdict of the jury will not be disturbed unless clearly unsupported by the evidence.

Dakota—Territory of Dakota v. Stone, 4 N. W. Rep. 697.

Iowa—Lovejoy v. Sherman, 1 N. W. Rep. 535.

Minnesota—Davis v. Smith, 7 Minn. (Gil.) 328; Benz v. Geissell, 24 Minn 169.

Nebraska—Railroad Co. v. Jones, 2 N. W. Rep. 363; Townley v. Cady, 6 N. W. Rep. 464.

Wisconsin—Wausau Boom Co. v. Plumer, 5 N. W. Rep. 53.

Verdict will be vacated when clearly unsupported by the evidence. Roberts v. Swearingen, 1 N. W. Rep. 305; Kearney v. Railroad Co. 2 N. W. Rep. 82; Fiske v. State of Nebraska, Id. 381; Marvin v. Dutcher, 4 N. W. Rep. 685; Whittier v. Railroad Co. 5 N. W. Rep. 372; Stanley v. Risse, Id. 467; Collins v. Jackson, Id. 1052; First Nat. Bank of Afton v. Elliott, 6 N. W. Rep. 687; Allen v. Wheeler, 7 N. W. Rep. 111; Waufle v. McLellan, 8 N. W. Rep. 300: Rodman v. Nathan, Id. 562; Aldrich v. Price, 9 N. W. Rep. 376; Gammon v. Abrams, 10 N. W. Rep. 479; Jennings v. Simpson, 11 N. W. Rep. 880; Johnson v. Railroad Co. 12 N. W. Rep. 329; Holland v. Griffith, 14 N. W. Rep. 387.

The verdict will also be set aside when contrary to the instructions of the court. Aultman v. Reams, 4 N. W. Rep. 81; Schweitzer v. Connor, 14 N. W. Rep. 922; Bearss v. Sherman, 13 N. W. Rep. 869.

Informal verdicts. Darling v. West, 1 N. W. Rep. 531; Cummings v. Taylor, 21 Minn. 366; Freyburger v. Carney, 26 Minn. 84.

Excessive verdicts—remitter. La Salle v. Tift, 2 N. W. Rep. 1031; Corcoran v. Harran, 12 N. W. Rep. 468; Craig v. Cook, 28 Minn. 233.

Majority verdict not allowable. Snow v. Hardy, 3 Minn. (Gil.) 35.

Presumptions in favor of verdict. Credit Foncier v. Rogers, 4 N. W. Rep. 1012; Henry v. Hinman, 21 Minn. 378; Newell v. Houlton, 22 Minn. 19; State of Minnesota v. Owens, Id. 238; St. Paul Harvester Works v. Langin, 23 Minn. 462; Nieb v. Henderer, 4 N. W. Rep. 159.

Verdict for damages not claimed, but proved. Isaacson v. Railroad Co. 8 N. W. Rep. 600.

Verdict cannot be impeached by jury, nor by individual jurors. Stevens v. Montgomery, 6 N. W. Rep. 456; Martin v. Desnoyer, 1 Minn. (Gil.) 131; State of Minnesota v. Stokely, 16 Minn. (Gil.) 249. See sec. 286, (2.)

Power of court to direct verdict. Jackson v. Town of Jacksonport, 14 N. W. Rep. 296; Dawson v. Helmes, 14 N. W. Rep. 462; Joeckel v. Joeckel, 14 N. W. Rep. 598; Brown v. Lawler, 21 Minn. 327.

ARTICLE VI.—OF THE TRIAL BY THE COURT.

§ 265. **How jury waived.** Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

Wait, Code, 266; Harst. Pr. 631; Gifford v. Cole, 10 N. W. Rep. 672; Gregory v. City of Lincoln, 14 N. W. Rep. 157, 423.

§ 266. **When court to decide.** Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

Wait, Code, 267; Harst. Pr. 632.

§ 267. **Separately stated.** In giving the decision, the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly.

Wait, Code, 267; Harst. Pr. 633; Cheney v. Eberhardt, 1 N. W. Rep. 197; State of Iowa v. Dillard, 3 N. W. Rep. 807; Kemp v. Seeley, Id. 830; Smith v. Pendergast, Id. 978; Belt v. Stetson, 4 N. W. Rep. 779; Badger v. Daenicke, 14 N. W. Rep. 821; Wisconsin River Lumber Co. v. Plumber, 6 N. W. Rep. 319; Hilling v. New England Mortgage Security Co. 7 N. W. Rep. 275; Woodman v. Dutton, 10 N. W. Rep. 830; Althouse v. Baldwin, 14 N. W. Rep. 441; Caulfield v. Bogle, 11 N. W. Rep. 511; Haak v. Brown, 12 N. W. Rep. 219; 1 Dak. 227, 235, 351.

§ 268. **Findings waived.** Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial.

2. By consent in writing, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

Harst. Pr. 634.

§ 269. **Preparation of findings by parties.** At the time the cause is submitted the judge may direct either or both parties to prepare findings of facts, unless they have been waived, and when so directed the party must within two days prepare and serve upon his adversary, and submit to the judge, such findings, and may, within two days thereafter, briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify, or reject the findings so submitted. If, at the time of the submission of the cause, the judge does not direct the preparation of findings, or those prepared are rejected, then he must himself prepare the findings.

§ 270. **Making up judgment.** On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 229, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

Wait, Code, 269; Harst. Pr. 636.

ARTICLE VII.—OF REFERENCES AND TRIALS BY REFEREES.

§ 271. **Reference by consent.** A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered in the minutes:

1. To hear and determine any or all of the issues of fact in an action or proceeding, and to report a finding upon which judgment may be entered by the court.
2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Wait, Code, 270; Harst. Pr. 638; secs. 374, 229; Carpenter v. Shepardson; 1 N. W. Rep. 173; Grand Lodge of I. O. O. F. v. Morrison, 4 N. W. Rep. 739.

Referee has power to sign bill of exceptions. Turner v. Turner, 10 N. W. Rep. 545; Light v. Kennard, 6 N. W. Rep. 372; Brown v. Campau, 11 N. W. Rep. 845; Robinson v. O'Connor, Id. 859. May postpone trial on terms. Sec. 389. May subpœna witnesses. Secs. 447, 449, 510. But not to grant new trial. Murray v. School-dist. 9 N. W. Rep. 573.

§ 272. **Without consent.** Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in all cases formerly cognizable in chancery in which reference might be made.

Wait, Code, 271; Harst. Pr. 639; secs. 236, 270, 510; Carpenter v. Shepardson, 1 N. W. Rep. 173; The Monitor Iron Works Co. v. Ketchum, 2 N. W. Rep.

80; Knips v. Stifan, 6 N. W. Rep. 877: Fairbanks v. Newton, 7 N. W. Rep. 543; 1 N. W. Rep. 335.

§ 273. **To whom ordered.** A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county or subdivision in which the action or proceeding is triable, and against whom there is no legal objection.

Wait, Code, 273; Harst. Pr. 640; secs. 370, 374; Hopkins v. Sanford, 2 N. W. Rep. 39.

§ 274. **Challenges to referee.** Either party may object to the appointment of any person as referee for the same cause for which challenges for cause may be taken to a petit juror in the trial of a civil action.

Harst. Pr. 641.

For challenges to petit jurors. Secs. 243, 244.

§ 275. **Court or judge hears.** The objections taken to the appointment of any person as referee must be heard and disposed of by the court or judge thereof. Affidavits may be read, and witnesses examined as to such objections.

Harst. Pr. 642.

§ 276. **Report by referees.** The referees must report their findings in writing to the court within 20 days after the testimony is closed; but the time may be extended by consent of the parties, or by order of the court or judge.

Harst. Pr. 643. See secs. 277, 561, 643, 628, 261; Grand Lodge of I. O. O. F. v. Morrison, 4 N. W. Rep. 739; Fairbanks v. Newton, 1 N. W. Rep. 335.

§ 277. **Finding only of facts—special verdict.** The reference in all cases shall be to find the facts, and the finding reported has the effect of a special verdict, and may be excepted to and set aside in like manner.

Wait, Code, 272; Harst. Pr. 644, 645; secs. 374, 643; Houghton v. Milburn, 11 N. W. Rep. 517; Brockway v. Newton, 5 N. W. Rep. 781.

§ 278. **Oath of referees.** The referees, before proceeding to hear any testimony, must be sworn to well and truly hear and determine the facts referred to them, and true findings render according to the evidence; and they have power to administer oaths to all witnesses produced before them.

Wait, Code, 421; Monitor Iron Works Co. v. Ketchum, 2 N. W. Rep. 80; Harper v. Kissick, 3 N. W. Rep. 449.

ARTICLE VIII.—EXCEPTIONS.

§ 279. **How stated.** No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

Wait, Code, 264; Harst. Pr. 648.

(*a*) Exception contradistinguished from bill of exceptions. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Everett v. Buchanan, 6 N. W. Rep. 439.

(*b*) No error will be reviewed by the appellate court unless presented by bill of exception in due form. Bue v. Ketchum, 8 N. W. Rep. 231; Barkow v. Sanger, 3 N. W. Rep. 16; French v. Lancaster, 9 N. W. Rep. 716; Cramer v. Hanaford, 10 N. W. Rep. 15; Credit Foncier v. Rogers, 4 N. W. Rep. 1012; Dempsey v. Cogswell, 12 N. W. Rep. 148; Kehrig v. Peters, 2 N. W. Rep. 801; Schmeltz v. Schmeltz, 3 N. W. Rep. 536.

(*c*) Except errors patent on the record. Galloway v. McLean, 9 N. W. Rep. 98.

(*d*) The objector must state distinctly, at the time of taking his exception, all the grounds on which he relies to sustain it; for the bill which is then or afterwards prepared is only an embodiment of the exception as originally taken. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497.

(*e*) *When to be taken.* Exceptions to rulings of the court must be taken and stated at the time the ruling is made. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Light v. Kennard, 7 N. W. Rep. 539; Roode v. Dunbar, 2 N. W. Rep. 345.

(*f*) Exceptions to instructions to the jury may be taken any time before entry of final judgment. Sec. 249; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497.

(*g*) *The bill of exceptions.* The only purpose or office of a bill of exception is to bring upon the record points or rulings which, without it, could not appear. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Caulfield v. Bogle, Id. 511; Golden Terra Mining Co. v. Smith, 11 N. W. Rep. 98; Emery v. Emery, 6 N. W. Rep. 152; Daniels v. Gower, Id. 525; French v. Lancaster, 9 N. W. Rep. 716; Dufresne v. Weise, 1 N. W. Rep. 59; Donohue v. Hendrix, 13 N. W. Rep. 215.

(*h*) *What the bill of exceptions should contain.* When evidence is in any way involved, the bill must set forth only so much of it as is necessary, together with the directions prayed for, or objection raised, as will suffice for a complete understanding of the question presented. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; French v. Lancaster, 9 N. W. Rep. 716; Aultman & Taylor Co. v. Howe, 4 N. W. Rep. 357; Everett v. Buchanan, 6 N. W. Rep. 439; Hill v. Holloway, 3 N. W. Rep. 722; Oliver v. Sheeley, 9 N. W. Rep. 689; McMillan v. Malloy, 4 N. W. Rep. 1004; Davenport Plow Co. v. Mewis, Id. 1059; Woodlock v. Combs, 6 N. W. Rep. 362; West v. Ry. Co. 14 N. W. Rep. 292; Cattle v. Haddox, Id. 803.

(*i*) To insure reviewal of the charge of the court, the entire evidence must be certified and made part of the record. White v. Goodrich Transp. Co. 1 N. W. Rep. 75; Edwards v. Smith, 3 N. W. Rep. 758; McCormick v. Ketchum, 4 N. W. Rep. 798.

(*j*) Also to review the correctness of the verdict. McCormick v. Ketchum, 4 N. W. Rep. 798.

(*k*) Exceptions must be specific, and definitely point out the error complained of. Swenson v. Norton, 1 N. W. Rep. 22; Tower v. Densmore, Id. 315; Galloway v. McLean, 9 N. W. Rep. 98; French v. Lancaster, Id. 716; Stevens v. Taylor, 12 N. W. Rep. 625; Merchants' Bank of Canada v. Ortman, Id. 636.

(*l*) General exceptions unavailing. Meno v. Haeffel, 1 N. W. Rep. 31; W. & W. Manuf'g Co. v. Walker, Id. 1035; Benson v. Lundy, 3 N. W. Rep. 149; Harvy v. Tama County, 5 N. W. Rep. 130; Mich. Air-line Ry. Co. v. Barnes, 6 N. W. Rep. 651; Tagg v. Miller, Id. 764; Racine Basket Manuf'g Co. v. Koust, 7 N. W. Rep. 254; Gregory v. Langdon, Id. 871; Corcoran v. Harran, 12 N. W. Rep. 468; Shull v. Raymond, 23 Minn. 66.

§ 280. **Settled at time or after.** A bill containing the exceptions to any ruling may be presented to the judge at the time the ruling is made, or the exception may be entered on the judge's minutes and afterwards settled. The bill must be conformable to the truth, or be at the time corrected until it be so, and signed by the judge and filed with the clerk.

Wait, Code, 264; Harst. Pr. 649; French v. Lancaster, 9 N. W. Rep. 716; In re Gold Street, 3 N. W. Rep. 329; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Bergenthal v. Friebrantz, 4 N. W. Rep. 89; Everett v. Buchanan, 6 N. W. Rep. 439.

§ 281. **Time for presenting and settling bill of exceptions.** If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to time of the entry of judgment, may, upon five-days' notice to the adverse party, at any time after such ruling is made, and within thirty days after the entry of judgment, or such other times as may be fixed by the court or judge thereof, be presented to the judge and settled; and such settlement may be made either in term-time or in vacation. (*As amended March 4, 1881.*)

Wait, Code, 268; Harst. Pr. 650; French v. Lancaster, 9 N. W. Rep. 716; Fish v. Spencer, 4 N. W. Rep. 287; Cobb v. Chase, 6 N. W. Rep. 264; Gates v. Brooks, Id. 595; Dryden v. Wyllis, 7 N. W. Rep. 122; Deland v. Weddington, Id. 156; Sweet v. Wright, 10 N. W. Rep. 870; Tiffany v. Henderson, Id. 884; Co. Com'rs v. Saxon, 4 N. W. Rep. 309; Townley v. Ry. Co. 11 N. W. Rep. 55; Mason v. Phelps, Id. 413; Evans v. St. Paul F. & M. Ins. Co. Id. 594; Uhling v. Schellenberg, 12 N. W. Rep. 272; Semmens v. Walters, 13 N. W. Rep. 889; Hahn v. Miller, 14 N. W. Rep. 119; Wilson v. First Presbyterian Church, Id. 138.

Signed by referee. Turner v. Turner, 10 N .W. Rep. 545; Light v. Kennard, 6 N. W. Rep. 372.

In case of the death of the judge. Shaffronek v. Martin, 2 N. W. Rep. 343.

§ 282. **Exceptions after judgment.** Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and may be settled or noted as provided in section two hundred and eighty, and a bill thereof may be presented and settled afterwards, as provided in section two hundred and eighty-one, and within like periods after entry of the order, upon appeal from which such decision is reviewable.

Wait, Code, 268; Harst. Pr. 651; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497.

§ 283. **Application to supreme court.** If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as, the court may prescribe, and the bill, when proven, must be certified by a justice thereof as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

Harst. Pr. 652; Bellows v. Tod, 3 N. W. Rep. 102.

§ 284. **In case of vacancy.** If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same.

Harst. Pr. 653; Shaffronek v. Martin, 2 N. W. Rep. 343.

ARTICLE IX.—OF NEW TRIALS.

§ 285. **Definition.** A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

Harst. Pr. 656; Barkow v. Sanger, 3 N. W. Rep. 16.

New trial cannot be had before the same referee. Hopkins v. Sandford, 2 N. W. Rep. 39.

Referee cannot grant a new trial. Murray v. School-dist. 9 N. W. Rep. 573.

§ 286. **Causes for—who applies.** The former verdict or other decison may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which either party was prevented from having a fair trial.

Harst. Pr. 657; Stebbins v. Field, 2 N. W. Rep. 190; Kidd v. Fleek, Id. 1121; Kruger v. A. & F. Harvester Co. 4 N. W. Rep. 252; Lauer v. Bandow, Id. 774; Konklin v. City of Dubuque, 6 N. W. Rep. 894; City of Crete v. Childs, 9 N. W. Rep. 55; Johnson v. Dinsmore, 9 N. W. Rep. 558; Petrie v. Boyle, Id. 114; Cramer v. Hanaford, 10 N. W. Rep. 15; Hinman v. Hamilton Paper Co. Id. 160; Clutz v. Carter, Id. 541; Brett v. Farr, Id. 853; Fox v. Burke, 12 N. W. Rep. 459; Hill v. Denlinger, 12 N. W. Rep. 808; Golden Terra Min. Co. v. Smith, 11 N. W. Rep. 98.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

1 Dak. 488; McKinney v. Simpson, 2 N. W. Rep. 535; Scott v. Waldeck, 10 N. W. Rep. 413; Oswald v. Railroad Co. 11 N. W. Rep. 112; Webster Co. v. Hutchinson, 12 N. W. Rep. 534.

3. Accident or surprise, which ordinary prudence could not have guarded against.

Tower v. Densmore, 1 N. W. Rep. 315; Nolan v. Grant, 5 N. W. Rep.

513; Mehan v. C., R. I. & P. R. Co. 7 N. W. Rep. 613; Fetters v. Balch, 7 N. W. Rep. 688.

4. Newly-discovered evidence, material to the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

Bailey v. Landingham, 3 N. W. Rep. 460; Seeley v. Perry, 3 N. W. Rep. 678; Dingman v. State of Wisconsin, 4 N. W. Rep. 668; Helms v. Chadbourne, Id. 1065; Fenno v. Chapin, 8 N. W. Rep. 762; Smith v. Smith, Id. 868; Sheffield v. Mullen, 9 N. W. Rep. 756; Lampsen v. Brander, 11 N. W. Rep. 94; Cook v. Smith, 12 N. W. Rep. 617; Ogden v. State of Nebraska, 14 N. W. Rep. 165; Gorachi v. Hintz, Id. 379; State of Minnesota v. Wagner, 23 Minn. 544.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

Bowe v. Rogers, 7 N. W. Rep. 547; Gorachi v. Hintz, 14 N. W. Rep. 379; Corcoran v. Harran, 12 N. W. Rep. 468.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

Smith v. Lander, 4 N. W. Rep. 767; Jones v. Ry. Co. 5 N. W. Rep. 854; Richardson v. Coddington, 7 N. W. Rep. 903; Campbell v. Landberg, 8 N. W. Rep. 168; Ohlsen v. Manderfield, 10 N. W. Rep. 418; Stillwater Street Ry. Transfer Co. v. Rheiner, 12 N. W. Rep. 449; Potvin v. Curran, 14 N. W. Rep. 400; Id. 414, 365, 406.

7. Error in law occurring at the trial, and excepted to by the party making the application.

Territory of Dakota v. Gay, 2 N. W. Rep. 477; Eisley v. Malchow, 2 N. W. Rep. 372; Huot v. McGowen, 6 N. W. Rep. 426; City of Crete v. Childs, 9 N. W. Rep. 55; Jenks v. Knott's Mexican Silver Min. Co. 12 N. W. Rep. 588; Harrison v. Baker, 14 N. W. Rep. 541.

(*a*) New trial should be granted only for the causes specified. Flower v. Grace, 23 Minn. 32; Smith v. Smith, 8 N. W. Rep. 868.

(*b*) Motion for new trial may be waived and appeal taken. Gutwillig v. Stumes, 2 N. W. Rep. 774.

(*c*) Of the order for new trial. Brown v. Byam, 12 N. W. Rep. 770; Bowe v. Rogers, 7 N. W. Rep. 547.

(*d*) After special verdict has been set aside, party who does not ask for new trial waives it. Brown v. Byam, 12 N. W. Rep. 770.

§ 287. **Application for new trial—how made.** When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the preceding section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon a bill of exceptions or a statement of the case, or upon the minutes of the court. On such hearing reference may be had in all cases to the pleadings and orders of the court on file; and where the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and stenographic report of the testimony or other papers used upon the trial. *(As amended March 4, 1881.)*

Harst. Pr. 658; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Loucheim v. Strause, 6 N. W. Rep. 360; Hintrager v. Sumbardo, 7 N. W. Rep.

92; Olmstead v. Life Ins. Co. Id. 403; Fenno v. Chapin, 8 N. W. Rep. 762; Smith v. Smith, Id. 868.

§ 288. **Time for serving notice of intention to move for new trial.** The party intending to move for a new trial must, within 10 days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, serve upon the adverse party a notice of his intention to move for a new trial, designating the ground upon which the motion will be made. The time for serving such notice may be extended by the court or judge thereof, or upon written consent of the parties. Motions for a trial on the ground of newly-discovered evidence may be made at the term at which the cause is tried, or at the next succeeding term. (*As amended March 4, 1881.*)

Harst. Pr. 659; Haas v. Domselar, 10 N. W. Rep. 227; Scott v. Waldeck, Id. 409; Brown v. Byam, 12 N. W. Rep. 770.

§ 289. **Verdict vacated by court.** The verdict of a jury may also be vacated, and a new trial granted, by the court in which the action is pending on its own motion, without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice.

Harst. Pr. 662; Allen v. Wheeler, 7 N. W. Rep. 111.

§ 290. **When motion for new trial may be heard at chambers.** When the action is tried by a district judge in his district out of the county of his residence, the motion for a new trial, if not made and brought to a hearing during the term, may be brought to a hearing before such judge at chambers, or in open court, in the county of his residence, or in any other county. (*As amended March 4, 1881.*)

Harst. Pr. 663.

ARTICLE X.—MANNER OF GIVING, ENTERING, AND SATISFYING JUDGMENTS.

§ 291. **Entered by clerk on order.** Judgment upon an issue of law or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof.

Secs. 298, 270, 226; Egan v. Sengfeil, 1 N. W. Rep. 467; Seymour v. Laycock, 2 N. W. Rep. 297; Smith v. Cummins, Id. 1041; Jewett v. Fink, Id. 1124; Case v. Plato, 6 N. W. Rep. 128; Gummer v. Village of Omro, Id. 885; Bixby v. Wilkinson, Id. 801; Wells v. Geiseke, 8 N. W. Rep. 380; Libby v. Mikkelberg, Id. 903; Loomis v. McKenzie, Id. 779; Brown v. Brown, 9 N. W. Rep. 790; Traer v. Waitman, Id. 339; Grimson v. Russell, Id. 647; Byers v. O'Dell, 10 N. W. Rep. 102; Moore v. McKinley, 14 N. W. Rep. 768; Cathcart v. Peck, 11 Minn. (Gil.) 24; Jorgensen v. Griffin, 14 Minn. (Gil.) 346; Hotchkiss v. Cutting, Id. 408; Leyde v. Martin, 16 Minn. (Gil.) 24; Findley v. Bowers, 2 N. W. Rep. 349.

Entry of judgment by confession. Grattan v. Matteson, 6 N. W. Rep. 298; Burley v. Millard, 9 N. W. Rep. 46; Phillips v. Shearer, Id. 218; Kern v. Chalfant, 7 Minn. (Gil.) 393.

§ 292. **Against whom — counter-claim.** 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and the court may determine the ultimate rights of the parties on each side as between themselves.

2. If a counter-claim, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; and the court may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

Wait, Code, 274; Harst. Pr. 578, 579, 666; secs. 123, 229, 262, 263, 644. 89, 402; Linenger v. Raymond, 2 N. W. Rep. 359; Hawthorn v. Unthank, 3 N. W. Rep. 518; Welp v. Gunther, 4 N. W. Rep. 647; Lauer v. Bandow, Id. 774; Johnson v. Van Velsor, 5 N. W. Rep. 265; Boswell v. Gates, 8 N. W. Rep. 809; Fetz v. Clark, 7 Minn. (Gil.) 159; Davidson v. Farrell, 8 Minn. (Gil.) 225; Hayes v. Frey, 11 N. W. Rep. 695.

§ 293. **Relief limited by complaint.** The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him relief consistent with the case made by the complaint and embraced within the issue.

Wait, Code, 275; Harst. Pr. 580; Lafevre v. Stone, 7 N. W. Rep. 400; McKay v. Hinman, 13 N. W. Rep. 15; Eaton v. Caldwell, 3 Minn. (Gil.) 80; De Mill v. Moffat, 13 N. W. Rep. 387.

§ 294. **Death before judgment.** If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Harst. Pr. 669; secs. 85, 88, 498, 562; Gilman v. Donovan, 5 N. W. Rep. 560, and 12 N. W. Rep. 779; Jennings v. Simpson, 11 N. W. Rep. 880.

§ 295. **To recover personalty.** In an action to recover the possession of personal property, the judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

Harst. Pr. 667; Eisley v. Malchow, 2 N. W. Rep. 372; Wise v. Frey, Id. 375; Woodruff v. King, Id. 452; Goodman v. Kennedy, 4 N. W. Rep. 987; Terryll v. Bailey, 7 N. W. Rep. 261; Hinchman v. Doak, 12 N. W. Rep. 39; Eaton v. Caldwell, 3 Minn. (Gil.) 80; Lewis v. Buck, 7 Minn. (Gil.) 71.

§ 296. **Putting in possession.** Every judgment that contains a direction for the sale of any specific real property may also direct the delivery of the possession of such property to the purchaser; and the officer receiving the execution or order of sale may enforce such judgment by putting the purchaser in possession of the premises, in like manner and with like authority as if special execution had been directed to him for that purpose.

§ 297. **Judgment-book.** The clerk shall keep, among the records of the court, a book for the entry of the judgments, to be called the "judgment-book."

Wait, Code, 279; Harst. Pr. 668.

§ 298. **Entries.** The judgment shall be entered in the judgment-book, and shall specify clearly the relief granted, or other determination of the action.

Wait, Code, 280; Findley v. Bowers, 2 N. W. Rep. 349; Sullivan's Saving Inst'n v. Clark, 12 N. W. Rep. 103; Preston v. Wright, 14 N. W. Rep. 352; Dodge v. Chandler, 9 Minn. (Gil.) 87.

§ 299. **Judgment roll—contents.** Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof; proof of service, and that no answer has been received; the report, if any; and a copy of the judgment.
2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment.

Wait, Code, 281; Harst. Pr. 661, 670; secs. 229, 694, 717, 719; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Golden Terra Min. Co. v. Smith, Id. 98; Herrick v. Butler, 14 N. W. Rep. 794; Everett v. Buchanan, 6 N. W. Rep. 439.

§ 300. **Transcript of judgment filed in another county constitutes a lien.** On filing a judgment roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court in which it was rendered, in a book to be known as the judgment docket, and in any other county upon filing with the clerk of the district court for said county a transcript of the original docket, and it shall be a lien on all the real property, except the homestead, in the county where the same is so docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered, and no judgment heretofore rendered shall, after the passage of this act, become a lien on real property as herein provided, unless it be docketed in the county where the land is situated.

Provided, however, that when the land is situated in an unorganized county said judgment may be filed in the county to which such unorganized county is attached for judicial purposes, and it shall thereupon become a lien upon the land of the judgment debtor in such unorganized county; but when said unorganized county becomes organized, the said lien must be filed in the office of the clerk of the district court of such county within ninety days after the organization of such county, or it shall cease to be a lien upon such real estate. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given and the appeal perfected, as provided in this Code, the court in which such judgment was recovered may, on special motion, after notice to the person owing the judgment, direct the clerk to make an entry on the judgment docket that the judgment is secured on appeal, and thereupon it shall cease, during the pendency of the appeal, to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith and for value. (*As amended February 14, 1883.*)

Wait, Code, 282; Harst. Pr. 671, 674; Mansfield v. Gregory, 9 N. W. Rep. 87; Wells v. Baldwin, 10 N. W. Rep. 427; Sullivan v. Leckie, 14 N. W. Rep. 355; Daniels v. Winslow, 4 Minn. (Gil.) 235; Folsom v. Carli, 5 Minn. (Gil.) 264.

§ 301. **Form of judgment docket.** The clerk shall docket the judgment by entering alphabetically in the judgment docket the names of the judgment debtor or debtors; the names of the party or parties in whose favor the judgment was rendered; the sum recovered or directed to be paid, in figures; the date of the judgment; the year, day, hour, and minute when the judgment roll or transcript was filed; the year, day, hour, and minute when the judgment was docketed in his office, and the page in the judgment-book where the same is entered; the name of the court in which the judgment was rendered; the name of the attorney or attorneys for the party recovering the judgment; and, if there are two or more judgment debtors, such entries must be repeated under the initial letter of the surname of each.

Harst. Pr. 672.

§ 302. **Assignment of judgment — formalities — entries.** Every clerk of the district court, upon the presentation to him of an assignment of any judgment rendered or docketed therein, signed by the party in whose favor the judgment is rendered, his executor, or administrator, and acknowledged in the manner prescribed by law for the acknowledgment of deeds, must immediately enter the same in the judgment-book, and must note the fact of such assignment, the date thereof, and the name of the assignee, in the margin of the entry of such judgment, in such judgment-book, and also upon the docket of such judgment. And the clerk of the district court of any other county or subdivision where such judgment is docketed, must note the fact of such assignment, the date thereof, and the name of the assignee, upon the presentation to and filing with him a certified copy of the original judgment docket, with the said facts of such assignment noted thereon.

Brisbin v. Newhall, 5 Minn. (Gil.) 217; Irvine v. Myers, 6 Minn. (Gil.) 398.

§ 303. **Cancellation and discharge.** Any judgment rendered or docketed in the district courts of the territory may be canceled and discharged by the clerk thereof:

1. Upon the filing with him of an acknowledgment of the satisfaction thereof, signed by the party in whose favor the judgment was obtained, his attorney of record, his executor, administrator, or assignee, and duly acknowledged in the manner required to admit a deed of real property to record.

2. Upon the return of any execution, issued upon such judgment, wholly satisfied, or the presentation of a satisfaction piece duly executed and acknowledged as hereinbefore provided, to the clerk of any district court, he must immediately note upon the judgment docket, and in the margin of the judgment-book where such judgment is entered, the date of such cancellation, and the manner thereof, by satisfaction piece filed, execution returned satisfied, or otherwise.

3. And any partial satisfaction of the judgment may be made and noted upon the records in like manner; and thereupon all judgments and liens thereby created must be taken and deemed to be canceled and discharged, to the extent of the entries so made upon the judgment docket, and no more.

4. And the clerk of any other district court, or the district court of any other county or subdivision, wherein a transcript of any such judgment docket shall have been filed, and judgment docketed accordingly, must cancel the same in like manner upon his judgment docket, upon the filing in his office of a certified copy of the original judgment docket entry, duly canceled as hereinbefore provided.

Harst. Pr. 675; Lough v. Pitman, 4 N. W. Rep. 229; Lamb v. Gregory, 11 N. W. Rep. 755.

§ 304. **Justice's judgment docketed by clerk — lien.** A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, must give a certified transcript thereof, which may be filed in the office of the clerk of the district court of the county or subdivision in which the judgment was rendered, and such clerk must thereupon enter such judgment in the judgment-book, and upon the judgment docket; and from the time of the docketing thereof it becomes a judgment of such district court, and a lien upon real property, and a certified transcript of the docket of such judgment may be filed, and the judgment docketed accordingly, in any other county or subdivision, with the like effect, in every respect, as if the judgment had been rendered in the district court where such judgment is filed.

Wait, Code, 63; Stamm v. Dixon, 5 N. W. Rep. 858.

§ 305. **Set-off of judgments.** Mutual final judgments may be set of, *pro tanto*, the one against the other, by the court, upon proper application and notice.

Sec. 644; Irvine v. Myers, 6 Minn. (Gil.) 398; Galloher v. Pendleton, 7 N. W. Rep. 512.

CHAPTER XIII.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

THE EXECUTION AND LEVY.

§ 306. **Within five years.** The party in whose favor judgment has heretofore been, or shall hereafter be, given, and, in case of his death, his personal representatives, duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same by writ of execution as provided in this chapter.

Wait, Code, 283; Harst. Pr. 681; secs. 365, 717; Thomas v. Nicklas, 11 N. W. Rep. 722; Woods v. Haviland, 13 N. W. Rep. 636.

§ 307. **After five years, by leave.** After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent, or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part.

Wait, Code, 284; Harst. Pr. 685; sec. 365; Jenness v. St. Clair Circuit Judge, 4 N. W. Rep. 220; Woods v. Haviland, 13 N. W. Rep. 636.

§ 308. **For delivery or sale.** Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material points thereof, and directing the proper officer to execute the judgment, by making the sale and applying the funds in conformity therewith. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

Wait, Code, 285; Harst. Pr. 684; sec. 309.

§ 309. **Kinds of execution.** There shall be three kinds of execution: one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery, with damages for withholding the same.

Wait, Code, 286; secs. 310, 311, 308.

§ 310. **Against property—to different counties.** When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of such county, or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a certificate of sale to the purchaser, as hereinafter provided. An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

Wait, Code, 287; Harst. Pr. 687; secs. 314, 318; Kentzler v. Railroad Co. 3 N. W. Rep. 369.

§ 311. **Against person, when.** If the action be one in which the defendant might have been arrested, as provided in section 149 and section 151, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this Code provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 149.

Wait, Code, 288; secs. 366, 149, 721-733.

§ 312. **Issue and contents of execution.** The writ of execution must be issued in the name of the territory of Dakota, attested in the name of the judge, sealed with the seal of the court, and subscribed by the clerk, and directed to the sheriff, or to the coroner when the sheriff is a party or interested; and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, to satisfy the judgment, with interest and accruing costs, out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.
2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, or tenants of real property, or trustees, to satisfy the judgment out of such property.
3. If it be against the person of the judgment debtor, to arrest such debtor and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law.
4. If it be for the delivery of the possession of real or personal property, to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

Wait, Code, 289; Harst. Pr. 682; secs. 358, 364, 309, 310; Kentzler v. Railroad Co. 3 N. W. Rep. 369; Bean v. Loftus, 4 N. W. Rep. 334; Merritt v. Grover, 10 N. W. Rep. 879; Hayden v. Smith, 12 N. W. Rep. 289; Latimer v. Jones, 8 N. W. Rep. 327.

§ 313. **Time of return.** The execution shall be returnable within sixty days, after its receipt by the officer, to the clerk with whom the record of judgment is filed.

Wait, Code, 290; Harst. Pr. 683; secs. 315, 330; Musser v. Maynard, 6 N. W. Rep. 55; Le Barron v. Taylor, 6 N. W. Rep. 35; Ward v. Citizens' Bank, 9 N. W. Rep. 437; Aultman v. McGrady, 12 N. W. Rep. 233; Cooper v. French, 3 N. W. Rep. 538; Tullis v. Brawley, 3 Minn. (Gil.) 191.

§ 314. **What property taken.** All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in real or personal property, and all other property not capable of manual delivery, shall be liable to be taken on execution and sold as hereinafter provided.

Harst. Pr. 688; secs. 371, 310, 202, 207, 318; Civil Code, Dak. 1753; Wheeler v. Konst, 1 N. W. Rep. 96; Carpenter v. Graham, 3 N. W. Rep. 974; Jacobson v. Metzgar, 5 N. W. Rep. 445; Graw v. Manning, 7 N. W. Rep. 150, and 79; Adams v. Hickox, 8 N. W. Rep. 485; Gillett v. Truax, Id. 767; Wells v. Baldwin, 10 N. W. Rep. 427; Meier v. Blake, 11 N. W. Rep. 621; Attarauge v. Christiansen, Id. 806; Turner v. Killian, 12 N. W. Rep. 101; Goozen v. Phillips, Id. 889; Walkley v. Bostwick, 13 N. W. Rep. 780. Equity of redemption. Barnes v. Cavanagh, 3 N. W. Rep. 801; Gale v. Hammond, 7 N. W. Rep. 761; Rosenfield v. Chada, 10 N. W. Rep. 465.

§ 315. **Officer's proceedings on.** When an execution is delivered to any officer he must indorse thereon the day and hour when he received it, and must proceed to execute the same with diligence; and, if executed, an exact description of the property at length, with the date of the levy, sale, or other act done by virtue thereof, must be indorsed upon or appended to the execution; and if the writ was not executed, or executed in part only, the reason in such case must be stated in the return. If no personal property be found, an indorsement to that effect must be made on the writ, before levy is made on real property.

Secs. 637, 312, 335, 336; Elmore v. Hill, 1 N. W. Rep. 235, and 8 N. W. Rep. 240; Latimer v. Jones, 8 N. W. Rep. 327; Crosby v. Hungerford, 12 N. W. Rep. 582; Baker v. Sheehan, Id. 704.

§ 316. **Levy and sale.** The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name if necessary, or by selling the same, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

Harst. Pr. 691; sec. 341; Rix v. Silknitter, 10 N. W. Rep. 653; Quackenbush v. Henry, 3 N. W. Rep. 262; Burrows v. Gibson, Id. 293; Le Barron v. Taylor, 6 N. W. Rep. 35; Stilson v. Gibbs, 9 N. W. Rep. 254; Folsom v. Carli, 5 Minn. (Gil.) 264.

As to the method of levying on rights and credits and other things not capable of manual delivery, see secs. 368, 208.

§ 317. **Amount levied—lien on personalty.** The officer must in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and, having made one levy, may at any time thereafter, make other levies if he deem it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof.

Sec. 341.

§ 318. **Things in action.** Judgments, bank bills, and other things in action may be sold, or appropriated, as provided in the next following section, and assignment thereof by the officer shall have the same effect as if made by the defendant.

§ 319. **Property not to be sold.** Money levied may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value.

§ 320. **Payment to sheriff.** After the rendition of the judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge therefor.

Sec. 367.

§ 321. **Claim by third person—sheriff's jury.** If the property levied on be claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff; and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses must be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees, and the fees of the jury, and the sheriff must return to the prevailing party the amount so deposited by him.

Harst. Pr. 689; secs. 186, 206; Sanders v. Chandler, 3 N. W. Rep. 351; Gray v. Parker, 5 N. W. Rep. 697; Bailey v. Chandler, 6 N. W. Rep. 480; Taylor v. Hanscom, 8 N. W. Rep. 825; Chapin v. Pinkerton, 12 N. W. Rep. 282; Barry v. McGrade, 14 Minn. (Gil.) 126; Lampsen v. Brander, 28 Minn. 526; Murphy v. Sherman, 25 Minn. 196.

EXEMPTIONS.

§ 322. **Exempt from all process.** Except as hereinafter provided, the property mentioned under this heading is exempt from attachment or *mesne* process, and from levy and sale on execution, and from any other final process issued from any court.

Harst. Pr. 690; sec. 371; Pol. Code, Dak. *c.* 38, *c.* 24, § 22. See Civil Code, Dak. §§ 442, 561, 2043.

§ 323. **Absolute exemptions.** The property mentioned in this section is absolutely exempt from all such process, levy, or sale:

1. All family pictures.
2. A pew or other sitting in any house of worship.
3. A lot or lots in any burial ground.
4. The family Bible, and all school books used by the family, and

all other books used as a part of the family library, not exceeding in value one hundred dollars.

5. All wearing apparel and clothing of the debtor and his family.

6. The provisions for the debtor and his family, necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year.

7. The homestead, as created, defined, and limited by law.

Harst. Pr. 690; Wilson v. Bartholomew, 7 N. W. Rep. 227.

§ 324. **Additional exemptions.** In addition to the property mentioned in the preceding section, the debtor may, by himself or his agent, select from all other of his personal property, not absolutely exempt, goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided.

Harst. Pr. 690. See sec. 747.

§ 325. **Specific alternative exemptions.** Instead of the exemption granted in the preceding section the debtor may select and choose the following property, which shall then be exempt, namely:

1. All miscellaneous books and musical instruments for the use of the family, not exceeding five hundred dollars in value.

2. All household and kitchen furniture, including beds, bedsteads, and bedding used by the debtor and his family, not exceeding five hundred dollars in value; and in case the debtor shall own more than five hundred dollars' worth of such property, he must select therefrom such articles to the value of five hundred dollars, leaving the remainder subject to legal process.

3. Three cows, ten swine, one yoke of cattle, and two horses or mules, or two yoke of cattle, or two span of horses or mules, one hundred sheep, and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned for one year, either provided or growing, or both, as the debtor may choose; also one wagon, one sleigh, two plows, one harrow, and farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

4. The tools and implements of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding two hundred dollars in value. The library and instruments of any professional person, not exceeding six hundred dollars in value.

Harst. Pr. 690; secs. 326, 327, 328, 329; Zielke v. Morgan, 7 N. W. Rep. 651.

§ 326. **Those by number chosen—by value appraised.** All the articles enumerated in the preceding section, which are exempt by limitation of number, must be chosen by the debtor, his agent or attorney; so, also, all property exempt by limitation of value must be determined by an appraisement made under the direction of the sheriff or other officer.

Harst. Pr. 690.

§ 327. **Appraisers selected.** To make the appraisement, the debtor, his agent or attorney, must select one person, and the creditor, his agent or attorney, another person, and these two, so selected, a third person, who must all be disinterested citizens of the county, not related to either party nearer than the fourth degree. If the two fail to agree upon the third person, the sheriff or other officer must select the third person; and in like manner, if either the debtor or creditor fail or refuse, upon notice, to select a person to act as one of the appraisers, the sheriff or other officer must select one for them.

Harst. Pr. 690.

§ 328. **Oath and duties of appraisers.** The three appraisers so selected must take and subscribe an oath before the sheriff or other officer, to be attached to the inventory of appraisement, that they will truly, honestly, and impartially appraise the property of the debtor. The property must be appraised at the usual price of such articles at sheriff's sales, as near as can be determined, and must be set down in an inventory by articles or by lots, when definitely descriptive, with the value opposite. From the appraisement so made, if over the limitation in value, the debtor, his agent or attorney, may select the amount in value of fifteen hundred dollars, or the alternative amounts in value, of each class, leaving the remainder, if any, in either case, subject to legal process.

Harst. Pr. 690.

§ 329. **Wife, or child over sixteen, may act.** If, in any case, the debtor neglect or refuse, or for any cause fail, to claim the whole or any of the aforesaid exemptions, his wife is entitled to make such claim or demand, and to select and choose the property, to select and designate one of the appraisers, and to do all other acts necessary in the premises, the same and with like effect as the debtor himself might do; and if she neglect, refuse, or for any cause fail so to do, in whole or in part, then one of their children, of sixteen years of age and upwards, being a member of the family, may do so in like manner and with like effect.

Harst. Pr. 690.

§ 330. **Sheriff to return exemptions.** The sheriff, or other officer having any process of levy or sale, must make return with his writ or warrant of any inventory and appraisement of any such exempted or other personal property.

§ 331. **Notice by sheriff to debtor—his claim.** In all cases of a levy upon personal property by a sheriff, constable, or other officer, he must give notice thereof to the debtor, his attorney, agent, or wife, or, failing conveniently to find either, to such child as is described in section 329; and the debtor, or such other person for him, must claim or demand the benefit of these exemptions within three days after such notice from the officer; and said notice of levy may be by copy or by reading.

Angell v. Johnson, 2 N. W. Rep. 435; Rosenthal v. Scott, 2 N. W. Rep. 909; Wicker v. Comstock, 9 N. W. Rep. 25; Crans v. Cunningham, 13 N. W. Rep. 176; Joyce v. Miller, Id. 664; Moffitt v. Adams, 14 N. W. Rep. 88; Green v. Blunt, 12 N. W. Rep. 762; Chapin v. Pinkerton, Id. 282.

§ 332. **Personal property—when not exempt—provisos.** Nothing in this chapter shall be so construed as to exempt any personal property from execution for laborers' or mechanics' wages, or physicians' bills, except that absolutely exempt: *Provided, however*, that a physician, in order to be entitled to the benefits of this act, must be a physician who has graduated at some reputable school of medicine, either of the United States or some foreign country, or who can produce a certificate of qualification from some state or territorial medical society, or who has been continuously engaged in the practice of medicine for a period of 10 years or more: *Provided*, that in case of physicians' bills there shall also be exempt household and kitchen furniture, including stoves of the debtor, to an amount not exceeding four hundred dollars, and also two cows: *Provided, however;* that this shall not apply to physicians' bills contracted before the passage of this act: *And further provided*, that the collection of physicians' bills shall not be enforced by legal process in less than six (6) months from the accruing thereof, except when the debtor is about to remove from the territory. (*As amended February 19, 1881.*)

No exemptions shall be allowed any person against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. Sess. Laws 1883, c. 50; Jones v. Parker, 8 N. W. Rep. 124.

§ 333. **Persons having no exemptions—partnerships.** Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons, namely:

1. To a corporation for profit.
2. To a non-resident.
3. To a debtor who is in the act of removing with his family from the territory; or,
4. Who has absconded, taking with him his family.
5. A partnership firm can claim but one exemption, of fifteen hundred dollars in value, or the alternative property, when so applicable, instead thereof, out of the partnership property, and not a several exemption for each partner.

§ 334. **For fines, penalties, and costs—forfeitures of recognizances.** No property, either real or personal, except the homestead and other exemptions made absolute, shall be exempt from levy, seizure, and sale by virtue of any final writ or process issued on a judgment for fines, penalties, or costs of criminal prosecutions; and no property, except the homestead and other exemptions made absolute, and personal property of any kind in addition thereto, to the value of five hundred dollars, shall be exempt from levy, seizure, or sale by virtue of any final writ or process issued on a judgment for forfeitures of undertakings and bonds, or of recognizance taken and entered in criminal cases.

SALES.

§ 335. **Published notice — perishable property.** The officer who levies upon personal property by virtue of an execution, must, before he proceeds to sell the same, cause public notice to be given of the time and place of such sale, for at least ten days before the day of sale. The notice must be given by advertisement, published in some newspaper printed in the county or subdivision, or, in case no newspaper be printed therein, by posting up advertisements in five public places in the county. Perishable property may be sold by order of the court or a judge thereof, prescribing such notice, time, and manner of sale as may be reasonable, considering the character and condition of the property.

Harst. Pr. 692; secs. 205, 571; Civil Code, Dak. 1776; Drew v. Kirkham, 1 N. W. Rep. 451; Everett v. Buchanan, 8 N. W. Rep. 35.

§ 336. **Public notice to be given.** Before any real property or interest therein, taken on execution, shall be sold, the officer making such sale must cause public notice of the time and place thereof, in manner following:

1. *In a newspaper.* If there be a newspaper printed in the county or subdivision where the real property to be sold is situated, such notice must be given by advertisement in some newspaper printed in such county or subdivision, once a week, for at least thirty days prior to making such sale.

2. *By posting notices.* In case there be no newspaper printed in such county or subdivision, then the officer making such sale must cause such advertisement to be made by posting a copy of such advertisement on the outer door of the court-house, or building wherein the district court of the county or subdivision was last held, and in five other public places in the county. All sales made without notice, as provided in this section, must be set aside by the court to which the execution is returnable, upon motion to confirm the sale. (*As amended February 14, 1879.*)

Secs. 600, 622, 335; Drew v. Kirkham, 1 N. W. Rep. 451.

§ 337. **Sale at court-house door.** All sales of real property, or any interest therein, under execution, must be held at the court-house, if there be one in the county or subdivision in which such real property is situated; and if there be no court-house, then at the door of the house in which the district court was last held; and if there be no court-house, and no district court have been held in the county or subdivision, then at such place within the county or subdivision as the sheriff shall designate in his notice of sale.

Sec. 622.

§ 338. **Manner and time of sale.** All sales of property under execution must be made at public auction, to the highest bidder, between the hours of nine in the morning and four in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. No sheriff or other officer, nor his deputy, holding the execution or making the sale of property, either personal or real, can become a purchaser, or be interested, directly or indirectly, in any purchase at such sale, and every purchase so made shall be considered fraudulent and void. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff or other officer must follow such directions.

Harst. Pr. 694; Geney v. Maynard, 7 N. W. Rep. 173; Kipp v. Bullard, 14 N. W. Rep. 364; First Nat. Bank of Waterloo v. Elmore, 3 N. W. Rep. 547.

§ 339. **Postponements.** When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may postpone the sale for not *less* [more] than three days, without being required to give any further notice thereof; but he shall not make more than two such postponements, and such postponement must be publicly announced when and where the sale should have taken place.

Reese v. Dobbins, 1 N. W. Rep. 540.

§ 340. **Overplus.** When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands on which said overplus may be rightfully applied.

§ 341. **New sale—additional levy—alias writ.** When property is unsold for want of bidders, the levy still holds good; and if there be sufficient time it may again be advertised or the execution returned, and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added, that if such property do not produce a sum sufficient to satisfy such execution, the officer must proceed to make an additional levy, on which he shall proceed as on other executions; or the plaintiff may, in writing, filed with the clerk, abandon such levy upon paying the costs thereof; in which case execution may issue with the same effect as if none had ever been issued.

Walter v. Greenwood, 12 N. W. Rep. 145; sec. 717.

§ 342. **Purchaser's right—sheriff's certificate.** Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two year's unexpired term, the sale is absolute. In all other cases the real property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it must be so stated.

Such certificate must be executed by the officer and acknowledged or proved, as is or may be required by law for deeds of real property, and may be recorded in the office of the register of deeds of the county wherein the real property is situated; and the same, or a certified copy thereof, certified by such register, shall be taken and deemed evidence of the facts therein recited and contained.

Harst. Pr. 700; Bartleson v. Thompson, 14 N. W. Rep. 795; Holtzinger v. Edwards, 1 N. W. Rep. 600; Atwood v. Beares, 8 N. W. Rep. 55; Shimer v. Hammond, 1 N. W. Rep. 656.

CONFIRMATION.

§ 343. **Proceedings upon confirmation.** If the court, upon the return of any writ of execution, for the satisfaction of which any real property or interest therein has been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this chapter, the court must make an order confirming the sale, and directing the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of one year from the day of sale, unless the same be redeemed as herein provided. And the officer, after making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings, as aforesaid, when he must pay the same to the person entitled thereto by order of the court.

Green v. State Bank of Nebraska, 2 N. W. Rep. 228; Findley v. Bowers, Id. 349; State Bank of Nebraska v. Green, 4 N. W. Rep. 942.

REDEMPTION.

§ 344. **Who may redeem—redemptioner.** Property sold subject to redemption, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Harst. Pr. 701; Shimer v. Hammond, 1 N. W. Rep. 656; Dickinson v. Hayes, Id. 834; Mihills Manuf'g Co. v. Camp, 5 N. W. Rep. 1; Hensley v. Whiffin, 6 N. W. Rep. 725; Kilbride v. Nunn, 8 N. W. R. 305; Diddy v. Risser, Id. 655; Hospes v. Ames, Id. 905; Hayden v. Smith, 12 N. W. Rep. 289; Brown v. Markley, Id. 721; Fiske v. Stewart, 4 N. W. Rep. 611.

§ 345. **Payment on and period for.** The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase, with twelve per cent. interest thereon, together with the amount of any assessment of taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

Harst. Pr. 702; Fiske v. Stewart, 4 N. W. Rep. 611; Hallibert v. Porter, 11 N. W. Rep. 84; Swearingen v. Roberts, Id. 325; Parke v. Hush, 13 N. W. Rep. 668.

§ 346. **Successive redemptions—payments.** If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with the like interest thereon in addition, as provided by the preceding section, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with interest at the same rate as provided for the first redemption in section three hundred and forty-five, in addition, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest.

Harst. Pr. 703.

§ 347. **Record of redemption.** Written notice of redemption must be given to the sheriff, and a duplicate filed with the register of deeds of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the register of deeds; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien.

Sec. 608; Willis v. Jelinck, 6 N. W. Rep. 373.

§ 348. **Period for deed—debtor's right.** If no redemption be made within one year after the sale, the purchaser or his assignee is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property.

Sec. 354.

§ 349. **Debtor's redemption.** If the debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale.

§ 350. **Payments to whom.** The payments mentioned in the last five sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale.

Harst. Pr. 704.

§ 351. **Requisite papers.** A redemptioner must produce to the officer or person from whom he seeks to redeem, and serve, with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the district court of the county where the judgment is docketed, or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the register of deeds.

2. A copy of the assignment necessary to establish his claim,

verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Harst. Pr. 705.

§ 352. **Use of premises — waste.** Until the expiration of the time for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

Harst. Pr. 706; secs. 634, 652.

§ 353. **Rents—account for.** The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If the purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in the district court of the county where the real property is situated to compel an accounting and disclosure of such rents and profits, and, until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

Harst. Pr. 707.

THE SHERIFF'S DEED.

§ 354. **Effect of—contents.** Upon the expiration of the period for redemption, the proper officer must make the purchaser, or the party entitled thereto, a deed of the real property sold. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary is proved, and shall vest in the purchaser, or other party as aforesaid, as good and as perfect title, in the premises therein mentioned and described, as was vested in the debtor at or after the time when such real property became liable to the satisfaction of the judgment. And such deed or conveyance, to be made by the sheriff or other officer, must recite the execution or executions, or the substance thereof, and the names of the parties, the amount, and date of rendition of such judgment, by virtue whereof the said real property was sold as aforesaid, and must be executed, acknowledged, or proved, and recorded, as is or may be provided by law to perfect the conveyance of real property in other cases.

Secs. 348, 355, 342, 581, 609; Mansfield v. Gregory, 1 N. W. Rep. 382; Foley v. Kane, 4 N. W. Rep. 821; Mihills Manuf'g Co. v. Camp, 5 N. W. Rep. 1; Kilbride v. Nunn, 8 N. W. Rep. 305; Schmeltzer v. Lombard, 10 N. W. Rep. 669.

§ 355. **Successors, same power.** If the term of service of the sheriff or other officer who has made or shall hereafter make, sale of any real property shall expire; or if the sheriff or other officer shall be absent, or be rendered unable, by death or otherwise, to make a deed or conveyance of the same,—any succeeding sheriff or other officer may execute to the purchaser or person entitled thereto, or his legal representatives, a deed of conveyance of said real property so sold; and such deed shall be as good and valid in law, and have the same effect, as if the sheriff or other officer who made the sale had executed the same.

GENERAL PROVISIONS.

§ 356. **Printer's fees in advance.** The officer who levies upon personal property or real property, or who is charged with the duty of selling the same, by virtue of any writ of execution, may refuse to publish a notice of the sale thereof by advertisement in a newspaper, until the party for whose benefit such execution is issued, his agent or attorney, shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice. Before any officer shall be excused from publishing the notice, as aforesaid, he must demand of the party for whose benefit the execution was issued, his agent or attorney, provided either of them reside in the county, the amount of money for such fees.

Pol. Code Dak. *c.* 39, § 22.

§ 357. **Effect of reversal.** If any judgment, in satisfaction of which any real property be sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser; but in such case restitution must be made by the judgment creditor of the money for which such real property was sold, with lawful interest thereon from the day of sale.

Sec. 412.

§ 358. **Principal and surety.** In all cases where judgment is rendered upon any instrument in writing, in which two or more persons are severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his co-defendant, the court must, in entering judgment thereon, state which of the defendants is principal debtor, and which are sureties or bail. And execution issued on such judgment must command the sheriff or other officer to cause the money to be made of the personal property and real property of the principal debtor; but, for want of sufficient property of the principal debtor to make the same, to cause the same to be made of the personal and real property of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, must be exhausted before any of the property of the surety or bail shall be taken in execution.

Sec. 364.

§ 359. **Amercement of sheriff.** If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or to sell any personal or real property, or to return any writ of execution to the proper court, on or before the return-day; or, on demand, to pay over to the plaintiff, his agent or attorney of record, all moneys by him collected or received, for the use of said party, at any time after collecting or receiving the same, except as otherwise provided; or, on demand made by the defendant, his agent or attorney of record, to pay all overplus received from any sale,—such sheriff or other officer shall, on motion in court and two-days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant, as the case may be.

Secs. 365, 361; Ghost v. Hill, 9 N. W. Rep. 642; Heymann v. Cunningham, 8 N. W. Rep. 401; Musser v. Maynard, 6 N. W. Rep. 55.

§ 360. **Of clerk—same.** If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received, in his official capacity, for the use of such person, every such clerk may be amerced; and the proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties.

Secs. 365, 361.

§ 361. **Measure of same.** When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per centum thereon.

§ 362. **Return of writ by mail.** When execution shall be issued in any county, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to inclose such execution by mail to the clerk who issued the same. On proof being made by such sheriff or coroner that the execution was mailed soon enough to have reached the said clerk within the time prescribed by law, the sheriff or coroner shall not be liable for any amercement or penalty, if it do not reach the office in due time.

§ 363. **Proceedings against officer.** No sheriff shall forward, by mail, any money made on such execution, unless he shall be specially instructed to do it by the plaintiff, his agent or attorney of record. In all cases of a motion to amerce a sheriff, or other officer, of any county other than the one from which the execution issued, notice in writing shall be given to such officer, as hereinbefore required, by leaving it with him, or at his office, at least fifteen days before the first day of the term at which such motion shall be made, or by transmitting the notice by mail at least sixty days prior to the first day of the term at which such motion shall be made. All amercements so procured shall be entered on the record of the court, and shall have the same force and effect as a judgment.

§ 364. **Surety made party.** Each and every surety of any sheriff or other officer may be made a party to the judgment rendered as aforesaid, against the sheriff or other officer, by action to be commenced and prosecuted as in other cases; but the property, personal or real, of any such surety shall not be liable to be taken on execution when sufficient property of the sheriff, or other officer, against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer by attachment or other proceeding, at his election.

Sec. 358.

§ 365. **Officer's reimbursement.** In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he must be permitted to take out executions and collect the amount of said judgment in the name of the original plaintiff, for his own use.

Harst. Pr. 1055; secs. 359, 360, 361.

CHAPTER XIV.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 366. **Discovery—debtor's appearance—examination—arrest of debtor—answers not excused.** 1. When an execution against property of the judgment debtor, or any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the territory, to the sheriff of the county, where a judgment roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued.

2. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, that any judgment debtor, residing in the district where such judge resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution.

3. On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

4. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor leaving the territory, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and if it then appears that there is danger of the debtor leaving the territory, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such an undertaking, he may be committed to prison by warrant of the judge, as for contempt.

5. No person shall, on examination pursuant to this chapter, be excused from answering any questions on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his prop-

erty for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Wait, Code, 292; Harst. Pr. 714, 715; secs. 149, 151, 309, 311, 376; Nieuwankamp v. Ullman, 2 N. W. Rep. 131; Kellogg v. Coller, 3 N. W. Rep. 433.

§ 367. **Debtor's debtor.** After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Wait, Code, 293; Harst. Pr. 716; sec. 320.

§ 368. **Examination of same.** After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceedings to be given to any party to the action in such manner as may seem to him proper. The proceedings mentioned in this section and in section three hundred and sixty-six may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

Wait, Code, 294; Harst. Pr. 717.

(*a*) Affidavit. Russell v. Ralph, 10 N. W. Rep. 518; Storm v. Adams, 14 N. W. Rep. 69.

(*b*) Service of notice. Matthews v. Smith, 12 N. W. Rep. 821; Williams v. Railroad Co. 6 N. W. Rep. 445; Padden v. Moore, 12 N. W. Rep. 724; Storm v. Adams, 14 N. W. Rep. 69; Ide v. Harwood, Id. 884; Morris v. N. P. R. Co. 8 N. W. Rep. 804; Miller v. Hitchcock, 12 N. W. Rep. 871; Hopson, v. Dinan, Id. 875.

(*c*) Examination. Penn v. Pelan, 3 N. W. Rep. 540; Thompson v. Silvers, 13 N. W. Rep. 854.

(*d*) Answer of garnishee. Penn v. Pelan, 3 N. W. Rep. 540; Spears v. Chapman, 5 N. W. Rep. 1038; Wenich v. Scribner, 6 N. W. Rep. 91; Lusk v. Galloway, 8 N. W. Rep. 608; Morris v. U. P. R. Co. Id. 804; Klauber v. Wright, Id. 893; Smith v. Ainscow, 9 N. W. Rep. 646; Warder v. Baker, 11 N. W. Rep. 342; Selz v. Bank of Fort Atkinson, 12 N. W. Rep. 433; Brainard v. Simmons, Id. 484; Walker v. Detroit, G. H. & M. R. Co. 13 N. W. Rep. 812.

(*e*) The answers of garnishee may be traversed. Secs. 373, 209, 369.

(*f*) What is subject to garnishment. Nash v. Gale, 2 Minn. (Gil.) 265.

Residuum of mortgaged property. Davis v. Wilson, 3 N. W. Rep. 52. Rent to become due. Thorpe v. Preston, 4 N. W. Rep. 227. Insurance money assigned. Turner v. Burnell, 4 N. W. Rep. 30. Judgment rendered by justice of the peace. Sievers v. Sarven Wheel Co. 5 N. W. Rep. 311; 13 N. W. Rep. 583. County order. Merill v. Campbell, 5 N. W. Rep. 912. Proceeds of mortgaged property sold. Burnett v. Gustafson, 6 N. W. Rep. 132. Justice's judgment. Weimeister v. Singer, 6 N. W. Rep. 858. Claim of damages for libel. Detroit Post & Tribune Co. v. Reilly, 9 N. W. Rep. 492. Public money on deposit to account of depositor. Bank v. Gandy, 9 N. W. Rep. 566; Long v. Emsley, 10 N. W. Rep. 280. Board bill. Singer v. Townsend, 10 N. W. Rep. 365. Property in hands of assignee for benefit of creditors. Gimble v. Ferguson, 10 N. W. Rep. 789. Property in hands of administrator. Case Threshing-mach. Co. v. Miracle, 11 N. W. Rep. 580. Pension money. Webb v. Holt, 11 N. W. Rep. 658. Money in the hands of executive officer. Storm v. Adams, 14 N. W. Rep. 70. Money on deposit to pay a license. Pundt v. Clary, 14 N. W. Rep. 167. Money due for wages. Mooney v. U. P. R. Co. 14 N. W. Rep. 343. Property in hands of assignee. Ide v. Harwood, 14 N. W. Rep. 884. Claim due to several jointly. Markham v. Farrell, 3 N. W. Rep. 262; Singer v. Townsend, 10 N. W. Rep. 365. Municipal and political corporations cannot be garnished. Merrill v. Campbell, 5 N. W. Rep. 912; State v. Eberly, 12 N. W. Rep. 96. Moneys held in trust. Van Winkle v. I., I. & S. Fence Co. 9 N. W. Rep. 211.

(*g*) Judgment. Bushnell v. Allen, 4 N. W. Rep. 599; O'Rourke v. Railroad Co. 7 N. W. Rep. 582; Smith v. Ainscow, 9 N. W. Rep. 646; White v. Ledyard, 12 N. W. Rep. 216.

(*h*) Discharge of garnishee. Miller v. Hitchcock, 12 N. W. Rep. 871; Noble v. Bates, 6 N. W. Rep. 237; Pioneer Printing Co. v. Sanborn, 3 Minn. (Gil.) 304.

§ 369. **Witnesses.** Witnesses may be required to appear and testify on any proceeding under this chapter, in the same manner as upon the trial of an issue.

Wait, Code, 295; Harst. Pr. 718; sec. 375.

§ 370. **Referee—answers on oath.** The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge. If before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Wait, Code, 296; secs. 374, 271, and notes.

§ 371. **Property applied—wages exempt.** The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied, when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of a family supported wholly or partly by his labor.

Wait, Code, 279; Harst. Pr. 719; Mooney v. U. P. R. Co. 14 N. W. Rep. 343.

§ 372. **Receiver—restraint of property transfers—record.** The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section two hundred and nineteen. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment debtor; and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his his office, to be called "Book of orders appointing receivers of judgment debtors," and shall note the time of filing said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the register of deeds of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the register of deeds of the county in which such judgment debtor resides.

Wait, Code, 298. Injunction. Secs. 189, 634. Receivers. Secs. 219, 373; Winland v. Holcomb, 3 N. W. Rep, 341; Myton v. Davenport, 2 N. W. Rep. 402; Jacobs v. Gibson, Id. 893; Schreiber v. Carey, 4 N. W. Rep. 124; Goodhue v. Daniels, 6 N. W. Rep. 129.

§ 373. **Adverse claims—proceedings on.** If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

Wait, Code, 299; Harst. Pr. 720; sec. 223.

§ 374. **Referee—appointment.** The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Wait, Code, 300; sec. 370.

§ 375. **Witness' fees — disbursements.** The judge may allow to the judgment creditor, or any party so examined, whether a party to the action or not, witness fees and disbursements.

Wait, Code, 301.

§ 376. **Disobedience—contempt.** If any person, party, or witness disobey an order of the judge or referee, duly served, such person, party, or witness may be punished by the judge as for a contempt. And in all cases of commitment under this chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

Wait, Code, 302; Harst. Pr. 721.

CHAPTER XV.

OF THE COSTS AND DISBURSEMENTS IN CIVIL ACTIONS.

§ 377. **Costs allowed prevailing party.** The amount of fees of attorneys, solicitors, and counsel in civil and criminal actions must be left to the agreement, express or implied, of the parties. But in civil actions there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, in addition to the disbursements now allowed by law, which allowances are termed costs. (*As amended March 2, 1883.*)

Amount of costs allowed. When allowed, the costs mentioned in section three hundred and seventy-seven of the Code of Civil Procedure shall be as follows:

1. To the plaintiff, for all proceedings before notice of trial in actions arising on contract for the recovery of money only, five dollars; in other actions, ten dollars; for all proceedings after notice of and before trial, three dollars; for each additional defendant served with process, not exceeding ten, one dollar.
2. To the defendant, for all proceedings before notice of trial, five dollars; and for all proceedings after notice of and before trial, three dollars.
3. To either party, when a new trial shall be had, for all proceedings after

granting of and before such new trial, five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, two dollars; for drawing interrogatories to annex to a commission for the taking of testimony, two dollars; for making and serving a case, or case containing exceptions, five dollars, except that when the case shall necessarily contain more than fifty folios, there shall be allowed two dollars in addition thereto.

4. For every trial of an issue of fact, five dollars.

5. To either party, on appeal to the supreme court, before argument, five dollars; for argument, fifteen dollars; and when a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment.

6. To either party, for every term not exceeding five, at which the cause is necessarily on the calendar, and is not tried, or is postponed by order of the court, three dollars; and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars.

§ 2. **When this act not to apply.** That none of the costs provided in this act shall be allowed to any plaintiff in a judgment upon a written contract for the payment of attorney's fees, executed before the passage of this act. (*Act of March* 2, 1883, *Session Laws*, *p.* 17.)

Wait, Code, 303; Harst. Pr. 1021; sec. 378.

§ 378. **Same in written instrument.** When, by the terms of any written instrument, it appears that the debtor has made a written contract for the allowance of attorney's fees, the same must be allowed by the court, in conformity to the instrument, and must form a part of the judgment and be incorporated therein.

Repealed, March 2, 1883; Session Laws, p. 18. See secs. 377, 615, 645.

§ 379. **Costs taxed in judgment.** In all actions and special proceedings the clerk must tax as a part of the judgment, in favor of the prevailing party, the allowance of his witnesses', the jury, officers,' and printers' fees, the compensation of referees, and the necessary expenses of taking depositions and procuring necessary evidence.

Secs. 375, 390, 394, 508, 544, 542, 382.

Witness fees. Pol. Code, Dak. *c.* 39, §§ 25; secs. 451, 452. Jury fees. Id. *c.* 39, § 26. Clerk's fees. Id. Sheriff's fees. Id. *c.* 39, § 9. Printer's fees. Id. *c.* 39, § 22. Referee's fees. Secs. 388, 564; McConkey v. Chapman, 12 N. W. Rep. 295.

The clerk of the court has power to tax and adjust costs only on the application of the prevailing party. Ballou v. Railroad Co. 10 N. W. Rep. 87.

The clerk must compute interest. Sec. 386; Herrick v. Butler, 14 N. W. Rep. 794; Boland v. Benson, 11 N. W. Rep. 911; Fairbanks v. Newton, 4 N. W. Rep. 327; In re Pinney, 7 N. W. Rep. 144; In re Will of Cole, 9 N. W. Rep. 664; State of Wisconsin ex rel. v. Jenkins, 1 N. W. Rep. 241; Siebert v. Mainzer, Id. 824; Thompson v. Townsend, Id. 1042; Drummond v. Irish, 2 N. W. Rep. 622; Schoeffel v. Hinze, 3 N. W. Rep. 379; Fairbanks v. Newton, 4 N. W. Rep. 327; McConkey v. Chapman, 12 N. W. Rep. 295; Weston v. Olson, 13 N. W. Rep. 700.

§ 380. **Appeal from same.** Any person aggrieved by the taxation of costs may appeal therefrom to the court or a judge thereof.

Harst. Pr. 1033.

§ 381. **When costs allowed plaintiff upon recovery.** Costs shall be allowed, of course, to the plaintiff upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In the actions of which a court of justice of the peace has no jurisdiction.

4. In an action for the recovery of money where the plaintiff shall recover fifty dollars. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs and disbursements than damages. And in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs and disbursements than damages, unless he recovers also property, the value of which, with damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars; such value must be determined by the jury, court, or referee, by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than the disbursements heretofore allowed by law shall be allowed to the plaintiff in more than one of such actions, which must be at his election: *provided*, that the party or parties proceeded against in such action or actions shall, at the time of the commencement of the previous action or actions, have been openly within this territory, and not secreted. Costs shall be allowed, of course, to the defendants in the actions mentioned in this section, unless the plaintiff be entitled to costs therein. (*As amended March 2, 1883.*)

Wait, Code, 304; Harst. Pr. 1023, 1025; Beck v. Deveraux, 2 N. W. Rep. 365; Martin v. Grover, Id. 354; Fire Dep't of Oshkosh v. Tuttle, 7 N. W. Rep. 549.

§ 382. **Costs in discretion of the court.** In actions other than those specified in section (381) three hundred and eighty-one of the Code of Civil Procedure, costs may be allowed or not, in the discretion of the court. In all actions where there are several defendants, not united in interests, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor. (*As amended March 2, 1883.*)

Wait, Code, 306; Harst. Pr. 1024, 1026; State of Nebraska v. Ensign, 10 N. W. Rep. 449; Jones v. State of Nebraska, 14 N. W. Rep. 901.

§ 383. **Discretion of court.** In the following cases the costs of an appeal must be in the discretion of the court:

1. When a new trial shall be ordered.
2. When a judgment shall be affirmed in part and reversed in part.

Harst. Pr. 1027; Stevenson v. Circuit Judge, 6 N. W. Rep. 217; Sherry v. Schraage, 4 N. W. Rep. 117; Howell v. Kittredge, 8 N. W. Rep. 91; Ellison v. Kittredge, Id. 95; Nelson v. Munch, 14 N. W. Rep. 578.

§ 384. **Against attempting party.** When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action.

§ 385. **On appeals.** Costs must be allowed to the prevailing party in judgments rendered on appeal from justices' courts, in all cases, including his costs taxed in the court below.

§ 386. **Interest.** When the judgment is for the recovery of money, interest, from the time of the verdict or report until judgment be finally entered, must be computed by the clerk and added to the costs of the party entitled thereto.

Wait, Code, 310; Harst. Pr. 1035.

§ 387. **Notice of taxing costs—verification—items.** The clerk must insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorney reside in the same city, village, or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this Code. The costs must be stated in detail, and verified by affidavit of the party or his attorney, stating in substance that the items of costs have been, or will necessarily be, incurred in the action or proceeding. A copy of the items of the costs and affidavit must be served with a notice of adjustment. Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceeding, the same shall be adjusted by the judge before whom the same be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.

Wait, Code, 311; Harst. Pr. 1033; Johnson v. Curtis, 8 N. W. Rep. 489; Whelply v. Nash, Id. 570; Ballou v. Ry. Co. 10 N. W. Rep. 87; Herrick v. Butler, 14 N. W. Rep. 794.

§ 388. **Referees' fees.** The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

Wait, Code, 313; Harst. Pr. 1028; secs. 564, 592.

§ 389. **Costs of postponement.** When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Wait, Code, 314; Harst. Pr. 595, 1029; Everett v. Buchanan, 6 N. W. Rep. 439; Bays v. Herring, 1 N.W. Rep. 558; Finnerty v. Coughlin, 5 N.W. Rep. 704; Masterson v. Brown, 1 N.W. Rep. 791; Brandt v. McDowell, 2 N.W. Rep. 1100.

§ 390. **Of infant plaintiff by guardian.** When costs are adjudged against an infant plaintiff, the guardian, by whom he appeared in the action, must be responsible therefor, and payment thereof may be enforced by attachment.

Wait, Code, 316; sec. 80; Prob. Code, Dak. § 157; Scrafford v. County Sup'rs, 4 N. W. Rep. 167.

§ 391. **Of trustee from trust funds.** In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be chargeable only upon, or collected of, the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense.

Wait, Code, 317; Harst. Pr. 1031; sec. 80; Prob. Code, Dak. § 157; Scrafford v. County Sup'rs, 4 N. W. Rep. 167; In re Will of Cole, 9 N. W. Rep. 664; Hei v. Heller, 10 N. W. Rep. 620.

§ 392. **Against territory—exception.** In all civil actions prosecuted in the name of the territory, by an officer duly authorized for that purpose, the territory shall be liable for the costs in the same cases and to the same extent as private parties. If a private person be joined with the territory as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the territory until after execution be issued therefor against such private party and returned unsatisfied.

Wait, Code, 319; Harst. Pr. 1038; sec. 535.

§ 393. **To party in interest.** In an action prosecuted in the name of the territory, for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation, or person, costs awarded against the party plaintiff shall be charged against the party for whose benefit the action was prosecuted, and not against the territory.

Wait, Code, 320; sec. 535.

§ 394. **Costs taxed to assignee.** In actions in which the cause of action shall, by assignment, after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

Wait, Code, 321.

§ 395. **On change of venue.** Whenever a change of venue is granted in any case pending in the district courts, all the costs and fees paid by the county to which the case is ordered for trial shall be charged to the county from which such case is sent.

Sec. 396.

§ 396. **Account for same.** The board of county commissioners of the county to which any case is ordered for trial, as provided by this Code, must make out and present for payment to the county from which such case is sent an itemized bill of all the costs and fees of the trial of such case, paid by the county according to law. Said bill must be sworn to by the county clerk, and the board of county commissioners receiving such bill or account must examine the same and pay the whole thereof, or so much as is legal, proper, and correct.

Sec. 395.

§ 397. **Surety for, by non-resident.** In cases in which the plaintiff is a non-resident of the territory or a foreign corporation, before commencing such action, the plaintiff must furnish a sufficient surety for costs. The surety must be a resident of the county or subdivision where the action is to be brought, and must be approved by the clerk. His obligation shall be complete by simply indorsing the summons, or signing his name on the complaint as security for costs.

Harst. Pr. 1036; secs. 536, 398–402.

The plaintiff in an action, also the defendant, is primarily liable for all costs which he makes. Achler v. Stark, 11 N. W. Rep. 320; Ortman v. Bank of Canada, 4 N. W. Rep. 167; McConkey v. Chapman, 12 N. W. Rep. 295; Brion v. Kennedy, 11 N. W. Rep. 288.

§ 398. **Responsibility of.** He shall be bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought, or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtained judgment or not.

Ortman v. Bank of Canada, 4 N. W. Rep. 167.

§ 399. **Dismissal.** An action in which security for costs is required by the last section, and has not been given, shall be dismissed on the motion and notice by the defendant at any proper time before judgment, unless in a reasonable time, to be allowed by the court, such security for costs be given.

Harst. Pr. 1037.

§ 400. **Plaintiff becoming non-resident.** If the plaintiff in an action, after its commencement, become a non-resident of the territory, he shall give security for costs in the manner and under the restrictions provided in the two preceding sections.

§ 401. **Additional security.** In an action in which security for costs has been given, the defendant may at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety has removed from this territory, or is not sufficient, the action may be dismissed, unless in a reasonable time, to be fixed by the court, sufficient surety is given by the plaintiff.

§ 402. **Judgment against surety.** After final judgment has been rendered in an action, in which security for costs has been given, as required by this chapter, the court, on motion of the defendant, or any other person having a right to such costs or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the defendant or his legal representatives, against the surety for costs, his executors or administrators, for the amount of costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment, as in other cases, for the use and benefit of the person entitled to such costs.

CHAPTER XVI.

OF APPEALS IN CIVIL ACTIONS.

§ 403. **Chapter governs.** The modes of reviewing a judgment or order in a civil action shall be those prescribed by this chapter.

Wait, Code, 323; Harst. Pr. 936.

§ 404. **Order without notice.** An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it, or may be vacated or modified on notice in the manner in which other motions are made.

Wait, Code, 324; Harst. Pr. 937.

§ 405. **Appeals allowed.** Any party aggrieved may appeal in the cases prescribed in section twenty-two of this Code.

Wait, Code, 325; Harst. Pr. 938.

Only the party *aggrieved* can appeal. Downer v. Howard, 3 N. W. Rep. 1; Kemp v. Hine, Id. 831; McGregor v. Pearson, 8 N. W. Rep. 101; Whaley v. Gale, 12 N. W. Rep. 33; Parker v. Field, Id. 194; Yetzer v. Marlin, Id. 630. Intervenor. Mower's Appeal, 12 N. W. Rep. 646; Walsh v. Thompson, 3 N. W. Rep. 563; Dent v. Smith, 5 N. W. Rep. 143; Goodman v. Kennedy, 4 N. W. Rep. 987; Murray v. Wells, 10 N. W. Rep. 288; Reisner v. Currier, 12 N. W. Rep. 250.

§ 406. **Parties — how termed.** The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action must not be changed in consequence of the appeal.

Wait, Code, 326.

§ 407. **Notice of appeal—amendment—service of notice.** An appeal must be made:

1. By the service of a notice in writing on the adverse party or his attorney, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof.

2. When a party shall, in good faith, give notice of an appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

3. If service of the notice of appeal upon the attorney for the adverse party cannot, with due diligence, be made within the territory in the manner prescribed by this Code, the notice of appeal may be served, and notice of the subsequent proceedings may be given to him, in such manner as the court or a judge thereof shall direct.

Wait, Code, 327; Harst. Pr. 940.

(*a*) Notice of appeal is a necessary jurisdictional act and cannot be waived. In re Opening Gold street, Newton, appellant, 3 N. W. Rep. 311, and 8 N. W. Rep. 139; Weed v. Parsons, 3 N. W. Rep. 635; Fairburn v. Goldsmith, 9 N.W. Rep. 300; Palmer v. Peterson, 1 N. W. Rep. 73; County Com'rs v. Saxon, 4 N. W. Rep. 309; Srigley v. Witherell, 7 N. W. Rep. 126; Hanks v. North, Id. 156; Pettingill v. Donnelly, Id. 360; Galloway v. Litchfield, 8 Minn. (Gil.) 160; Baberick v. Magner, 9 Minn. (Gil.) 217; County Com'rs v. Sutton, 23 Minn. 299; Kasson v. Estate of Broeker, 1 N. W. Rep. 418; Gregg v. Uhless, 25 Minn. 272.

(*b*) Appeal perfected. Secs. 419, 422; County Com'rs v. Saxon, 4 N. W. Rep. 309; Loomis v. McKinzie, 8 N. W. Rep. 779.

(*c*) Amendments. Sabotta v. St. Paul Fire & Marine Ins. Co. 12 N. W. Rep. 381; Dobbins v. Lusch, 5 N. W. Rep. 205; C. & N. E. R. Co. v. Edson, 3 N. W. Rep. 176; Fowler v. Hyland, 12 N. W. Rep. 26; Gress v. Evans, 1 Dak. 387.

§ 408. **Transmission of papers.** If the appellant do not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or, if the appeal be from an order or any part thereof, a certified copy of such order and the papers upon which the order was granted, to be transmitted to the supreme court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such clerk to the supreme court, and recover the expenses thereof, as costs on such appeal, in case the judgment or order appealed from be in whole or in part affirmed.

Wait, Code, 328; Harst. Pr. 951, 953.

What constitutes the record.

Judgment roll. Secs. 229, 299, 694, 717, 719; Keegan v. Peterson, 24 Minn. 1. In re Opening Gold street, Newton, appellant, 3 N. W. Rep. 329; Gress v. Evans, 1 Dak. 387–394; Hocum v. Weitherick, 22 Minn. 152; Haller v. Blaco, 4 N. W. Rep. 362; State of Minnesota v. Lautenschlager, 23 Minn. 290. Affidavit for continuance. Everett v. Buchanan, 6 N. W. Rep. 439.

Nothing is of record, for purposes of appeal, except the judgment roll proper. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Post No. 21 v. Carver, 23 Minn. 567; Rhoades v. Siman, 24 Minn. 192; State of Iowa v. Foster, 7 N. W. Rep. 643; Thompson v. Howe, 21 Minn. 98; Daniels v. Langdon, 3 N. W. Rep. 497; Bontin v. Grow, 1 N. W. Rep. 11.

Extrajudicial statements are not. Rogers v. Hoenig, 1 N. W. Rep. 17; Smith v. Cumins; 2 N. W. Rep. 1041.

Record must be made up in the court below. Dobbins v. Lusch, 5 N. W. Rep. 205; Abrahams v. Sheehan, 7 N. W. Rep. 822; Alexander v. McGrew, 8 N. W. Rep. 347; Marwick v. Elsey, Id. 587; Nevil v. Clifford, Id. 296; Pittman v. Pittman, 2 N. W. Rep. 536; Weed v. Parsons, 3 N. W. Rep. 635; Hart v. Jackson, 10 N. W. Rep. 295; Deland v. Weddington, 7 N. W. Rep. 156; Wertin v. Crocker, 6 N. W. Rep. 683; State of Iowa v. Henry, 10 N. W. Rep. 678.

Facts certified for appeal. Wheaton v. Foster, 12 N. W. Rep. 629; Green v. Ronen, Id. 765.

Judge's certificate. Alexander v. McGrew, 10 N. W. Rep. 666; Fitch v. Flynn, 11 N. W. Rep. 649; Wheaton v. Foster, 12 N. W. Rep. 629. See sec. 280 and references.

Appeal bond is not necessary part of the record. Hilton v. Ross, 2 N. W. Rep. 862.

§ 409. **Dismissal upon failure.** If the appellant fail to cause the requisite papers to be transmitted to the supreme court, as required by the preceding section and the rules of the court, the appeal may be dismissed.

Harst. Pr. 954.

(*a*) Dismissal of the appeal for imperfect or defective record. Sec. 408 and references.

(*b*) The appeal will also be dismissed when the record fails to meet the strict formal requirements of the statute. St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Cottrill v. Cramer, 1 N. W. Rep. 106; Betts v. City of Glenwood, 2 N. W. Rep. 1012; Leech v. Philpott, 12 N. W. Rep. 116.

(*c*) The appeal will also be dismissed when the record fails to show affirmatively a distinct question for the consideration of the court. Galloway v. McLean, 9 N. W. Rep. 98; 1 Dak. 335; Wilson v. Iowa Co. 1 N. W. Rep. 490; Throckmorton v. Horton, 3 N. W. Rep. 461; Wheaton v. Foster, 12 N. W. Rep. 629; Landers v. Boyd, Id. 740; Ranney v. Templin, 6 N. W. Rep. 296; Betts v. City of Glenwood, 2 N. W. Rep. 1012; Low v. Fox, 9 N. W. Rep. 131; County of Pottawattamie v. County of Marshall, Id. 326; Wilson v. Klokenteger, Id. 346; Leitelt v. Parker, 12 N. W. Rep. 219; Kitteringham v. Dance, Id. 612; Kehrig v. Peters, 2 N. W. Rep. 801; Nevil v. Clifford, 8 N. W. Rep. 296.

(*d*) But errors patent on the face of the record will be reviewed. Galloway v. McLean, 9 N. W. Rep. 98; Roode v. Dunbar, 2 N. W. Rep. 345; Everett v. Buchanan, 6 N. W. Rep. 439.

(*e*) Nor will the court review any question not submitted to the court below. Birdsall v. Carter, 7 N. W. Rep. 751; Roode v. Dunbar, 2 N. W. Rep. 345; McCormack v. Drummet, Id. 729; Black v. Boyd, Id. 1044; Kidd v. Fleek, Id. 1121; Alleman v. Stepp, 3 N. W. Rep. 636; Smalley v. Green, Id. 78; Kelly v. Rogers, 21 Minn. 147; Spencer v. Railroad Co. 22 Minn. 29, 34; Cogan v. Cook, Id. 137.

(*f*) Nor any new question first raised on appeal. Cottrill v. Cramer, 1 N. W. Rep. 106; Kidd v. Fleek, 2 N. W. Rep. 1121. Farrar v. Peterson, 3 N. W. Rep. 457; Huntley v. Smith, 12 N. W. Rep. 200. In re Campau's Estate, Id. 217; Winchester v. King, Id. 220; Byrne v. M. & St. L. R. Co. Id. 698; Kendig v. Overhulser, Id. 264. But see Holt v. Van Epps, 1 Dak. 207; Drake, v. Barton, 18 Minn. (Gil.) 414.

(*g*) Nor errors assigned and not argued. Hepman v. City of Dubuque, 2

N. W. Rep. 1027; Rice v. Plymouth Co. 6 N. W. Rep. 23; Hoffman v. Dickey, Id. 174; Dinning v. Bement, Id. 184; Stanton County v. Canfield, Id. 466. Finnerty v. Coughlin, 5 N. W. Rep. 704; Cassedy v. Casey, 12 N. W. Rep. 286.

(*h*) The court will *ex officio* take notice of its want of jurisdiction. Palmer v. Peterson, 1 N. W. Rep. 73; Graves v. Richmond, 12 N. W. Rep. 80; Green v. Ronen, Id. 765.

(*i*) Appellate courts are reluctant to disturb the findings of judge or jury. Bontin v. Grow, 1 N. W. Rep. 11; Caulfield v. Bogle, 11 N. W. Rep. 511; Wambole v. Foot, 2 N. W. Rep. 239; Rupp v. Steinback, 12 N. W. Rep. 658; O'Leary v. Iskey, 10 N. W. Rep. 576; Armstrong v. Freeman, 2 N. W. Rep. 353; Murray v. Wells, 10 N. W. Rep. 288; Taft v. Tiede, 7 N. W. Rep. 617; Clark v. Ralls, 12 N. W. Rep. 260; Id. 283; Vittoe v. Richardson, Id. 603; Stillwater Street Ry. Transf. Co. v. Rheiner, 12 N. W. Rep. 449; Hicks v. Stone, 13 Minn. (Gil.) 398; Barron v. Paulson, 22 Minn. 36.

§ 410. **Effect of.** The dismissal of an appeal is, in effect, an affirmance of the judgment or order appealed from, unless the dismissal be expressly made without prejudice to another appeal.

Harst. Pr. 955; In re Opening of Gold Street, Newton, appellant, 3 N. W. Rep. 311.

§ 411. **What reviewable on appeal.** Upon an appeal from a judgment the supreme court may review any verdict, decision, or intermediate order involving the merits and necessarily affecting the judgment.

Wait, Code, 329; Harst. Pr. 956. See secs. 22 and 409, and references.

Supreme court will not review an order granted on default. Dols v. Baumhager, 10 N. W. Rep. 420. Nor a point made on the separate answer of a non-appellant. Fairbairn, v. Middlemiss, 11 N. W. Rep. 203. Nor, *in certiorari*, any grounds of error not set out in the affidavit for the writ. Ry. Co. v. Russ, 11 N. W. Rep. 289. Nor isolated portions of judge's charge, when, etc. Dibble v. Nash, 11 N. W. Rep. 399. On appeal from order confirming foreclosure sale, court will examine no question arising previous to the decree. Burt v. Thomas, 12 N. W. Rep. 911. Nor, in a certain case, where part of the judgment only was appealed from. Maerchen v. Stall, 4 N. W. Rep. 352. Nor instructions and evidence not in the record. Daniels v. Langdon, 3 N. W. Rep. 497.

§ 412. **Power of supreme court.** Upon an appeal from a judgment or order, the supreme court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment, so far as such restitution is consistent with any rights of purchasers at sheriff's sale.

Wait, Code, 330; Harst. Pr. 957; secs. 23, 411, 357; 1 Dak. 387–394.

To reinstate an appeal. Baldwin v. O'Laughlin, 9 N. W. Rep. 79; Republican Valley Ry. v. McPherson, 11 N. W. Rep. 739; Kopmeier v. Larkin, 3 N. W. Rep. 373. In election contest. Miller v. Rolph, 1 N. W. Rep. 123; Nelson v. Munch, 9 N. W. Rep. 863; Graves v. Richmond, 12 N. W. Rep. 80. Naw v. Jackman, Id. 312; Wood v. Cullen, 13 Minn. (Gil.) 365.

§ 413. **Time for appeals.** The appeal to the supreme court under subdivison two of section twenty-two of this Code must be taken within sixty days after written notice of the order shall have been given to the party appealing. Every other appeal allowed must be taken within two years after the judgment shall be perfected by filing the judgment roll.

Wait, Code, 331; Harst. Pr. 939.

Time for appeal cannot be extended. Sec. 512; Sambs v. Stein, 11 N. W. Rep. 53; County Com'rs v. Saxon, 4 N. W. Rep. 309; Downer v. Howard, 3 N. W. Rep. 1; Republican Valley R. R. v. McPherson, 11 N. W. Rep. 739; Baldwin v. O'Laughlin, 9 N. W. Rep. 79; Humphrey v. Havens, 9 Minn. (Gil.) 301.

Notice given within the legal delay—appeal perfected after the delay had expired. Fairburn v. Goldsmith, 9 N. W. Rep. 300; Washburn v. Sharpe, 15 Minn. (Gil.) 43.

§ 414. **Undertaking required.** To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

Wait, Code, 334; Harst. Pr. 941.

Conditions of, in different cases. Secs. 415–418. Stays execution. Sec. 419. To be served with notice of appeal. Sec. 420. May be waived. Sec. 414. Justification of sureties on. Sec. 421. To be filed with the clerk. Sec. 423. Attorneys prohibited from being security on. Pol. Code, Dak. c. 18, § 8; Schuek v. Hagar, 24 Minn. 339. Not a necessary part of record on appeal. Hilton v. Ross, 2 N. W. Rep. 862; sec. 408, and notes.

§ 415. **Stay of execution — additional security — deposit.** If an appeal be from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking be executed on the part of the appellant by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. Whenever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file, and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking, with surety or sureties, he may, in lieu thereof, deposit with the officer or into court, as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this section, the money is so deposited with an officer, a judge of the court, at special term, or at chambers, upon the application of either party, may, before such deposit, if made, order it to be deposited in court instead of with such officers; and a deposit made pursuant to such order shall be of the same effect as if made with such officer.

Wait, Code, 335; Harst. Pr. 942; secs. 419, 422; Thomas v. Nicklas, 11 N. W. Rep. 722; Robertson v. Davidson, 14 Minn. (Gil.) 422; Dutcher v. Culver, 23 Minn. 415.

§ 416. **Judgment to assign or deliver documents.** If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or judge thereof, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Wait, Code, 336; Harst. Pr. 943.

§ 417. **To execute conveyance.** If the judgment appealed from direct execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Wait, Code, 337; Harst. Pr. 944.

§ 418. **To sell and deliver realty.** If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same must not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal be dismissed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not to exceed a sum to be fixed by a judge of the court by which the judgment was rendered, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Wait, Code, 338; Harst. Pr. 945.

§ 419. **Effect of perfected appeal—security limited.** Whenever an appeal is perfected, as provided in sections four hundred and fifteen, four hundred and sixteen, four hundred and seventeen, and four hundred and eighteen, it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, but the court below may proceed upon any other matter included in the action and not effected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by sections four hundred and fifteen, four hundred and sixteen, and four hundred and eighteen, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections four hundred and sixteen, four hundred and seventeen, and four hundred and eighteen, where it would otherwise, according to those sections, exceed that sum.

Wait, Code, 339; Harst. Pr. 946.

Executors and administrators exempt from giving appeal bond. Prob. Code, § 331.

§ 420. **Service of undertakings.** The undertakings prescribed by sections four hundred and fourteen, four hundred and fifteen, four hundred and sixteen, and four hundred and eighteen, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit be made as provided in section four hundred and fourteen, and notice thereof given.

Wait, Code, 340; Harst. Pr. 947.

§ 421. **Justification—notice—exceptions.** An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after the notice of the appeal; and unless they or other sureties justify before a judge of the court below, as prescribed by sections one hundred and sixty-five and one hundred and sixty-six, within ten days thereafter, the appeal must be disregarded as if no undertaking had been given. The justification must be upon a notice of not less than five days.

Wait, Code, 341; Harst. Pr. 948.

§ 422. **Other cases—perishable property.** In the cases not provided for in sections 415, 416, 417, and 418, the perfecting of an appeal, by giving the undertaking mentioned in section 414, shall stay proceedings in the court below, upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Wait, Code, 342; Harst. Pr. 949; secs. 205, 335.

§ 423. **Filing.** The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered.

Wait, Code, 343; sec. 526.

§ 424. **Special and summary proceedings.** The provisions of this chapter as to the security to be given upon appeals, and as to the stay of proceeding, shall apply to appeals taken under subdivision three of section twenty-two of this Code.

§ 425. **Other appeals.** In addition to the appeals provided for in this chapter, and section twenty-two of this Code, writs of error shall be allowed on all final decisions of the district courts to the supreme court under such regulations as may be prescribed by the rules or practice of the supreme court.

Wait, Code, 457; St. Croix Lumber Co. v. Pennington, 11 N. W. Rep. 497; Humphrey v. Havens, 9 Minn. (Gil.) 301; Moody v. Stephenson, 1 Minn. (Gil.) 289.

CHAPTER XVII.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES, AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

§ 426. **Summons after judgment.** When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section one hundred and five, those who were not originally summoned to answer the complaint, and did not appear in the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

Wait, Code, 375; Harst. Pr. 989; sec. 292.

§ 427. **Requisites of same.** The summons provided in the preceding section must be subscribed by the judgment creditor, or his attorney must describe the judgment, and require the person summoned to show cause within thirty days after the service of the summons; and must be served in like manner as the original summons. It is not necessary to file a new complaint.

Wait, Code, 377; Harst. Pr. 990; secs. 97, 102.

§ 428. **Affidavit.** The summons must be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and must specify the amount due thereon.

Wait, Code, 378; Harst. Pr. 991.

§ 429. **Defense.** Upon such summons the party summoned may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; and he may make the same defense which he might have originally made to the action, except the statute of limitations.

Wait, Code, 379; Harst. Pr. 992; secs. 118–121.

§ 430. **Further pleadings.** The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution; or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

Wait, Code, 380; Harst. Pr. 992, 993; sec. 124.

§ 431. **Pleadings verified.** The answer and reply must be verified in the like cases and manner, and be subject to the same rules as the answer and reply in an action.

Wait, Code, 381; sec. 125.

CHAPTER XVIII.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

§ 432. **Judgment offered—effect.** The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the court or judge thereof must, thereupon, order judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

Wait, Code, 385; Harst. Pr. 997.

To counter-claim. Sec. 433; Oleson v. Newell, 12 Minn. (Gil.) 114; Mansfield v. Fleck, 23 Minn. 61; Woolsey v. O'Brien, Id. 71; Phillips v. Shearer, 9 N. W. Rep. 218.

§ 433. **By plaintiff to counter-claim.** If the defendant set up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above, for the amount specified, if the offer entitle him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed to be withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter-claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay plaintiff's costs from the time of the offer.

§ 434. **Proffer of fixed damages.** In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing that, if he fail in his defense, the damages be assessed at a special sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages must be assessed accordingly.

Wait, Code, 386.

§ 435. **Plaintiff refusing—proof—costs.** If the plaintiff do not accept the offer, he must prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damages in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in consequence of any necessary preparations or defense in respect to the question of damages.

Wait, Code, 387.

CHAPTER XIX.

ADMISSION OR INSPECTION OF WRITINGS.

§ 436. **Exhibit and refusal—costs.** Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to costs in order to prove its genuineness, and the same be finally proved or admitted on the trial, such costs must be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal,

Wait, Code, [illegible]; Harst. Pr. 448, 449.

§ 437. **Copy of documents—penalty.** The court before which an action is pending, or a judge thereof, may in its or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may, on motion, exclude the paper from being given in evidence, or punish the party refusing, or both.

Wait, Code, 388; Harst. Pr. 1000.

CHAPTER XX.

EXAMINATION OF PARTIES.

§ 438. **Action for discovery.** No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

Wait, Code, 389.

§ 439. **Adversary a witness.** A party to an action may be examined as a witness, at the instance of the adverse party, or any of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission.

Wait, Code, 390; Harst. Pr. 1879, 2021. See sec. 366 and references; secs. 446, 445.

§ 440. **Examination before trial.** The examination, instead of being had at the trial, as provided by the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise; but the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

Wait, Code, 391. See secs. 451, 452.

§ 441. **Attendance—examination filed.** The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

Wait, Code, 392; secs. 503–507.

§ 442. **Rebuttal.** The examination of the party, thus taken, may be rebutted by adverse testimony.

Wait, Code, 393.

§ 443. **Refusal to testify, contempt.** If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply may be stricken out.

Wait, Code, 394; Harst. Pr. 1991; sec. 376.

§ 444. **Same on own behalf.** A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses.

Wait, Code, 395.

§ 445. **Beneficiary examined.** A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination, as if he were named as a party.

Wait, Code, 396.

CHAPTER XXI.

WITNESSES AND EVIDENCE.

§ 446. **Not excluded except — husband and wife — decedent's statement.** No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is the husband or wife of a party thereto, of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed, or defended, except as hereinafter provided:

1. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other,

nor to a criminal action or proceeding for a crime committed by one against the other.

2. In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered, or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party.

But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates. (*As amended February 20, 1879.*)

Wait, Code, 398, 399; Harst. Pr. 1881, 1879.

Husband and wife. U. S. v. Crow Dog, 14 N. W. Rep. 437; Martin v. Scott, 10 N. W. Rep. 532.

In actions by or against executors, etc. Chadwick v. Cornish, 1 N. W. Rep. 55; Downey v. Andrus, 4 N. W. Rep. 628; In re Eliza A. Dutcher v. Marvin, Id. 685; Haverly v. Alcott, 10 N. W. Rep. 326; In re Edwards, Id. 793; Williams v. Barrett, 3 N. W. Rep. 690; Bill v. Stow, 12 N. W. Rep. 444; Conger v. Bean, Id. 284; Housel v. Cremer, 14 N. W. Rep. 398; Eccard v. Brush, 11 N. W. Rep. 756.

Unsound mind. Cannady v. Lynch, 8 N. W. Rep. 164.

MEANS OF PRODUCING WITNESSES.

§ 447. **Subpœnas issue by whom.** Clerks of the supreme and district courts, the judges thereof, notaries public, justices of the peace, and referees, shall, on the application of any person having a cause or any matter pending in court, or before any such officer or tribunal, issue a subpœna for witnesses, inserting all the names required by the applicant in one subpœna, which may be served by any person not interested in the action, or by the sheriff, coroner, or constable; but when served by any person other than a public officer, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed, except when served by an officer.

Harst. Pr. 1986; secs. 449, 502, 453; McMillan v. Larned, 2 N. W. Rep. 662.

§ 448. **Requisites of.** The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

§ 449. **Depositions.** When the attendance of the witness before any officer, authorized to take depositions, is required, the subpœna may be issued by such officer.

§ 450. **How served.** The subpœna shall be served either by reading a copy delivered to the witness, or left at his usual place of residence; but such copy need not contain the name of any other witness.

Harst. Pr. 1987.

§ 451. **Where witness not required to attend.** A witness shall not be obliged to attend for examination, on the trial of a civil action, except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpœna is served upon him.

Harst. Pr. 1989; sec. 440.

§ 452. **Fees witness may demand.** A witness may demand his traveling fees, and fee for one day's attendance, when the subpœna is served upon him, and if the same be not paid the witness shall not be obliged to obey the subpœna. The fact of such demand and non-payment shall be stated in the return.

Sec. 461.

§ 453. **Disobedience contempt.** Disobedience of a subbœna, or a refusal to be sworn, or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required.

Harst. Pr. 1991; secs. 454, 443, 455, 456, 457.

§ 454. **Attachment for.** When a witness fails to attend in obedience to a subpœna, except in case of a demand and failure to pay his fees, the court or officer before whom his attendance is required may issue an attachment to the sheriff, coroner, or constable of the county, commanding him to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his appearance. Such sum shall be indorsed on the back of the attachment, and if no such sum is fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, as a rule, order him to show cause why an attachment should not issue against him.

Harst. Pr. 1993.

§ 455. **Punishment for disobedience.** The punishment for the said contempt shall be as follows: When the witness fails to attend, in obedience to the subpœna, except in case of a demand and failure to pay his fees, the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases, the court or officer may fine a witness in a sum not exceeding fifty nor less than five dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify, or give his deposition. The fine imposed by the court, and that imposed by the officer, shall be paid into the common-school fund of the county. The witness shall also be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify, or give his deposition.

§ 456. **Judge may discharge.** A witness so imprisoned by an officer before whom his deposition is being taken, may apply to a judge of the district court, who shall have power to discharge him, if it appear that his imprisonment is illegal.

§ 457. **Requisites of writ and commitment.** Every attachment for the arrest or order of commitment to prison of a witness, by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify particularly the cause of the arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order. Such order of commitment may be directed to the sheriff, coroner, or any constable of the county where such witness resides or may be at the time, and shall be executed by committing him to the jail of such county, and delivering a copy of the order to the jailer.

Harst. Pr. 1994.

§ 458. **Examination of prisoner.** A person confined in any prison in this territory may, by order of any court, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition.

Harst. Pr. 1995, 1879.

§ 459. **Remains in custody.** While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition.

§ 460. **Witness free from suit in other county.** A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpœna.

Harst. Pr. 2067.

§ 461. **Daily fees.** At the commencement of each day after the first day, a witness may demand his fees for that day's attendance, in obedience to a subpœna, and if the same be not paid he shall not be required to remain.

Sec. 452.

§ 462. **Oath of witness.** Before testifying, the witness must be sworn to testify as follows:

You do solemnly swear that the evidence you shall give relative to the matter in difference now in hearing, between ———, plaintiff, and ———, defendant, shall be the truth, the whole truth, and nothing but the truth. So help you God.

Any witness who is conscientiously scrupulous of taking the oath above described, shall be allowed to make affirmation, substituting for the words "So help you God," at the end of the oath, the following: "This you do affirm under the pains and penalties of perjury."

MODE OF TAKING THE TESTIMONY OF WITNESSES.

§ 463. **Three modes.** The testimony of witnesses is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination.

Harst. Pr. 2002.

§ 464. **Affidavit.** An affidavit is a written declaration under oath, made without notice to the adverse party.

Harst. Pr. 2003; secs. 510, 527.

§ 465. **Deposition.** A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories.

Harst. Pr. 2004, 2006.

§ 466. **Oral examination.** An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

Harst. Pr. 2005.

AFFIDAVIT.

§ 467. **Use of affidavit.** An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.

Harst. Pr. 2009.

§ 468. **Where and how made.** An affidavit may be made in and out of this territory before any person authorized to take depositions, and must be authenticated in the same way.

Harst. Pr. 2012–2015.

DEPOSITIONS.

§ 469. **Cases when deposition used.** The deposition of any witness may be used only in the following cases:

1. When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom.

2. When from age, infirmity, or imprisonment the witness is unable to attend court, or is dead.

3. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

Lyon v. Bremsen, 12 N. W. Rep. 32.

§ 470. **When taken.** Either party may commence taking testimony by depositions at any time after service upon the defendants.

Harst. Pr. 2020, 2021.
Service by publication. Sec. 106.

§ 471. **Depositions taken before what officers.** Depositions may be taken in this territory before a judge or clerk of the supreme court or district court, or before a justice of the peace, notary public, United States circuit or district court commissioner, or any person empowered by a special commission. (*As amended February 19, 1883.*)

§ 472. **Out of territory.** Depositions may be taken out of the territory by a judge, justice, or chancellor, or clerk of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, a commisssioner appointed by the governor of this territory to take depositions, or any person authorized by a special commission from any court of this territory.

Harst. Pr. 2024.

§ 473. **Not interested or of kin.** The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding.

§ 474. **Commission to take.** Any court of record of this territory, or any judge thereof, is authorized to grant a commission to take depositions within or without the territory. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it must be taken upon written interrogatories, unless the parties otherwise agree.

Harst. Pr. 2006, 2026.

MANNER OF TAKING AND AUTHENTICATING THEM.

§ 475. **Notice to adverse party.** Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of abode. The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of

Sundays and the day of service, and the examination may, if so stated in the notice, be adjourned from day to day.

Harst. Pr. 2031. Notice by publication. Sec. 476. See sec. 106; Toulman v. Swain, 10 N. W. Rep. 117; Benham v. Purdy, 4 N. W. Rep. 133; Vaughn v. Smith, 12 N. W. Rep. 604.

§ 476. **Same by publication.** When a party against whom the deposition is to be read is absent from or a non-resident of the territory, and has no agent or attorney of record therein, he may be notified of the taking of the deposition by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county; and if not, in some newspaper printed in this territory of general circulation in that county. The publication must contain all that is required in a written notice, and may be proved in the manner prescribed in publication of summons.

§ 477. **Written and subscribed.** The deposition must be written by the officer, or, in his presence, by the witness, or some disinterested person, and must be subscribed by the witness.

Harst. Pr. 2086.

§ 478. **How returned—opening—may be taken and used in other tribunals.** The deposition so taken shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the district court where the action or proceeding is pending. It shall remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney. Depositions taken pursuant to this chapter shall be admitted in evidence, on the trial of any civil action or proceeding pending before any other court, officer, or tribunal, and such deposition may be sealed up, indorsed with the title of the action or proceeding, the name of the officer taking the same, and addressed and transmitted by such officer to such court, officer, or tribunal.

Harst. Pr. 2026; secs. 506, 507.

§ 479. **Read in action between same parties.** When a deposition has once been taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter, between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this chapter.

Harst. Pr. 2034.

§ 480. **How authenticated.** Depositions taken pursuant to this chapter by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this territory or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal, and no other or further act or authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this territory, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by the official certificate and seal of any secretary or other officer of state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking the same, within the meaning of this chapter, authorized to take the same. But if the deposition be taken within or without this territory, under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same.

§ 481. **Certificate to deposition.** The officer taking the deposition shall annex thereto a certificate showing the following facts:

1. That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth.
2. That the deposition was reduced to writing by some proper person, naming him.
3. That the deposition was written and subscribed in the presence of the officer certifying thereto.
4. That the deposition was taken at the time and place specified in the notice.

Edwards v. Huer, 8 N. W. Rep. 717.

§ 482. **Requisite to reading.** When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for some cause, specified in section four hundred and sixty-nine of this Code, the attendance of the witness cannot be procured.

Harst. Pr. 2032; Curry v. Allen, 14 N. W. Rep. 733.

§ 483. **When deposition filed.** Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial.

EXCEPTIONS TO DEPOSITIONS.

§ 484. **In writing.** Exceptions to depositions shall be in writing, specifying the grounds of objections, and filed with the papers in the cause.

French v. Ry. Co. 3 N. W. Rep. 257; McMillan v. Ry. Co. 9 N. W. Rep. 347; Dietrich v. Railroad Co. 13 N. W. Rep. 13.

§ 485. **When filed.** No exception, other than for incompetency or irrelevancy, shall be regarded, unless made and filed before the commencement of the trial.

Locke v. Tuttle, 1 N. W. Rep. 1039; McMillan v. Railroad Co. 9 N. W. Rep. 347; Dietrich v. Ry. Co. 13 N. W. Rep. 13.

§ 486. **Heard before trial.** The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.

§ 487. **Errors waived.** Errors of the court, in its decisions upon exceptions to depositions, are waived unless excepted to.

OF PUBLIC DOCUMENTS, RECORDS, ETC.

§ 488. **Statutes, decisions, maps, and books.** Printed copies in volumes of statutes, code, or other written law, enacted by any other territory or state, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such territory, state or government, shall be admitted by the courts and officers of this territory, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other territory, state, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law. The term "public document" is defined to be all the publications and maps printed by order of the legislative assembly, or congress, or either house thereof; and all such documents are admissible in evidence.

Wait, Code, 426; Harst. Pr. 1888, 1900.

§ 489. **Judicial records, etc.** Copies of the records and judicial proceedings of any court of any state or territory of the United States, shall be admissible in evidence in all cases in this territory, when attested by the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form; and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within this territory as they have by law or usage in the courts of the state or territory from which they are taken.

Harst. Pr. 1893, 1905.

§ 490. **Proof of publication.** The affidavit of any printer, foreman of any printer, or publisher of any newspaper published in this territory, of the publication of any notice, order, or advertisement which, by any law of this territory, shall be required or authorized to be published in such newspaper, shall be entitled to be read in evidence in all courts of justice, and in all proceedings before any officer, board, or body, and shall be *prima facie* evidence of such publication, and of the facts stated therein.

Harst. Pr. 2010, 2011; secs. 107, 467.

§ 491. **Certified justice's record.** A transcript from the docket of any justice of the peace, of any judgment had before him, of the proceedings in the action, of the execution issued thereon, if any, and of the return of such execution, if any, when certified by such justice, shall be evidence to prove the facts contained in such transcript in any court, or legal proceedings in the county or subdivision wherein such judgment was rendered.

Harst. Pr. 1905, 1921; sec. 492.

§ 492. **Evidence in other county.** And such transcript may be read in evidence in any other county or subdivision, when there shall be attached thereto a certificate of the clerk of the district court, of the county or subdivision in which such judgment was rendered, under the seal of the court, to the effect that the person subscribing such transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county.

§ 493. **Acknowledged instruments.** Every instrument in writing, which is acknowledged or proved, and duly recorded, is admissible as evidence without further proof.

§ 494. **Record or copy, how evidence.** The record of such instrument, or a duly-authenticated copy thereof, is admissible in evidence whenever, by the party's own oath, or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, and not within his control.

§ 495. **Official records.** Entries in public or other official books or records, made in the performance of his duty by a public officer of this territory, or by another person in the performance of a duty specially enjoined by law, *prima facie* evidence of the facts stated therein.

Harst. Pr. 1920.

§ 496. **Same.** An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry.

Harst. Pr. 1926.

§ 497. **Certificate to copy—contents.** Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court, having a seal, under the seal of such court.

Harst. Pr. 1923.

§ 498. **Deemed naturally dead.** If any person, upon whose life any estate in real property depends, remains without the Unite States, or absents himself, in the territory or elsewhere, for seven years together, such person must be accounted naturally dead, in any action or special proceeding concerning such property in which his death shall come in question, unless sufficient proof be made in such case of the life of such person.

§ 499. **Confidential relations inviolate.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.
2. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined in the church to which he belongs.
3. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.
4. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

Harst. Pr. 1881.
Attorneys. Connelly v. Straw, 11 N. W. Rep. 17.

§ 500. **How waived.** If a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney, clergyman, priest, physician, or surgeon on the same subject, within the meaning of the first three subdivisions of the preceding section.

§ 501. **When judge or juror witness.** The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed, and to take place before another judge or jury.

Harst. Pr. 1883.

§ 502. **Interpreters—subpœna—oath.** When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be subpœnaed by any court or judge to appear before such court or judge to act as an interpreter in any action or proceeding. The subpœna must be served and returned in like manner as a subpœna for a witness. Any person so subpœnaed, who fails to attend at the time and place named in the subpœna, is guilty of contempt. The oath of the interpreter shall be as follows:

You do solemnly swear that you will justly, truly, and impartially interpret to ——— the oath about to be administered to him; and the questions which may be asked him, and the answers that he shall give to such questions, relative to the cause now under consideration before this court (or officer.) So help you God.

If the interpreter have conscientious scruples as to taking an oath, he may affirm in form as heretofore provided in case of witnesses.

Harst. Pr. 1884; secs. 447, 449.

PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 503. **Statements in verified petition.** The testimony of a witness may be perpetuated in the following manner: The applicant shall file in the office of the clerk of the district court a petition, to be verified, in which shall be set forth specially the subject-matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court in this territory, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff.

Harst. Pr. 2084.

§ 504. **Order for examination.** The court or judge thereof may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

Harst. Pr. 2084.

§ 505. **Attorney, when—examination.** When it appears satisfactory to the court or judge that the parties interested cannot be notified, such court or judge shall appoint a competent attorney to examine the petition, and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross-interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

Harst. Pr. 2086.

§ 506. **Before whom—return.** Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court in which the petition was filed.

Sec. 478.

§ 507. **Approval, filing, and use.** The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party, where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained or required; but such depositions shall be subject to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.

Harst. Pr. 2088.

§ 508. **Costs.** The applicant shall pay the costs of all such proceedings.

CHAPTER XXII.

MOTIONS AND ORDERS.

§ 509. **Order defined.** Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

Wait, Code, 400; Harst. Pr. 1003; sec. 684.

§ 510. **Motions—notice—preference—stay—referee.**

1. An application for an order is a motion.

2. Orders made out of court, without notice, may be made by any judge of the court, in any part of the territory.

3. Motions upon notice must be made within the district in which the action is triable.

4. In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

5. No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except to stay proceedings under an order or judgment appealed from, or upon previous notice to the adverse party.

When any party intends to make or oppose a motion in any court, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue, and the fees of such referee, for such service, shall be three dollars per day.

Wait, Code, 401; Harst. Pr. 1004; secs. 684, 272.

§ 511. **Service of notice.** When a notice of a motion is necessary, it must be served three days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Wait, Code, 402; Harst. Pr. 1005; secs. 512, 514–523.

§ 512. **Extension of time.** The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court. The affidavit, or a copy thereof, must be served, with a copy of the order, or the order may be disregarded.

Wait, Code, 405; sec. 143.

CHAPTER XXIII.

NOTICES, AND FILINGS, AND SERVICE OF PAPERS.

§ 513. **Notices in writing.** Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections, where not otherwise provided by this Code.

Wait, Code, 408; Harst. Pr. 1010.

§ 514. **Manner of service.** The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.
2. If upon a party, it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Wait, Code, 409; Harst. Pr. 1011; sec. 524; Chapin v. Pinkerton, 12 N. W. Rep. 282.

§ 515. **By mail.** Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

Wait, Code, 410; Harst. Pr. 1012; secs. 516, 520.

§ 516. **Method of same.** In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

Wait, Code, 411; Harst. Pr. 1013; secs. 515, 517.

§ 517. **Same—double time.** When the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

Wait, Code, 412.

§ 518. **Personal—three days.** Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least three days before the time appointed therefor.

Wait, Code, 413.

§ 519. **When notice unnecessary.** Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon him unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

Wait, Code, 414; sec. 108.

§ 520. **Non-resident party.** Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the territory, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk of the court for the party.

Wait, Code, 415; Harst. Pr. 1015; sec. 515–517.

§ 521. **Summons and pleadings, when filed.** The summons and the several pleadings in the action shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

Wait, Code, 416; Harst. Pr. 465; sec. 104; Millette v. Mehmke, 26 Minn. 306.

§ 522. **Service upon attorney.** Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

Wait, Code, 417; Harst. Pr. 1015.

§ 523. **Certain process not included.** The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Wait, Code, 418; Harst. Pr. 1016.

CHAPTER XXIV.

DUTIES OF SHERIFFS AND CORONERS.

§ 524. **Service of papers — in subdivision.** Whenever, pursuant to this Code, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and the provisions of this Code relating to the sheriff shall apply to coroners when the sheriff is a party. The sheriffs and coroners of the several counties in which the district courts are held, shall have and exercise the same power and authority in the service of papers, and the execution of writs and process of such courts in any county or place within the subdivision of which this county forms a part, as they have or can exercise in their own county.

Wait, Code, 419; sec. 661.

CHAPTER XXV.

MISCELLANEOUS PROVISIONS.

§ 525. **Copy of lost paper.** If any process, original pleadings, or any other paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

Wait, Code, 422; Harst. Pr. 408, 1045; sec. 507.

§ 526. **Undertakings—where filed.** The various undertakings required to be given by this Code must be filed with the clerk of the court, unless the Code expressly provides for a different disposition thereof, except that the undertakings provided for in this Code for the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken.

Wait, Code, 423; sec. 423.

§ 527. **Title of affidavits.** It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

Wait, Code, 406; Harst. Pr. 1046.

§ 528. **Consolidating actions.** When two or more actions are pending at any one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

Harst. Pr. 1048.

§ 529. **Action, when pending.** An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied.

Harst. Pr. 1049; secs. 96, 106, 197, 101, 108, 62.

§ 530. **Clerk's register of actions.** The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Harst. Pr. 1052.

CHAPTER XXVI.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATION IN THE NATURE OF QUO WARRANTO.

§ 531. **By civil action.** The remedies formerly attainable by the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, may be obtained by civil actions under the provisions of this chapter.

Wait, Code, 428; Harst. Pr. 802.

§ 532. **Territory against corporation.** An action may be brought by any district attorney in the name of the territory, or leave granted by the district court, or judge thereof, for the purpose of vacating the charter or the articles of incorporation, or for annulling the existence of a corporation other than municipal, whenever such corporation shall:

1. Offend against any of the laws creating, altering, or renewing such corporation; or,

2. Violating the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation, by abuse of its power; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of any district attorney, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the territory against the costs and expenses to be incurred thereby.

Wait, Code, 430; Harst. Pr. 803; Civil Code, Dak. § 376; Attorney General v. Manistee River Imp. Co. 4 N. W. Rep. 483; City of Detroit v. D. & H. Plank-road Co. 5 N. W. Rep. 275, 281; State of Minnesota v. Sharp, 6 N. W. Rep. 408; Mayor of Detroit v. Moran, 7 N. W. Rep. 180; In re Barnum, 8 N. W. Rep. 375.

§ 533. **Leave to bring such action.** Leave to bring the action may be granted upon the application of any district attorney, and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Wait, Code, 431.

§ 534. **Territory against person usurping—officer—illegal corporation.** An action may be brought by any district attorney in the name of the territory, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this territory, or any office in a corporation created by the authority of this territory; or,
2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,
3. When any association or number of persons shall act within this territory as a corporation, without being duly incorporated.

Wait, Code, 432; Harst. Pr. 803.

§ 535. **Person joined with territory.** When an action shall be brought by the district attorney by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the territory as plaintiff. And in every such case the district attorney may require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the territory against costs and expenses to be incurred thereby.

Wait, Code, 534; Harst. Pr. 810; Secs. 392, 393, 397; State of Wisconsin v. Jones, 1 N. W. Rep. 241.

§ 536. **Proceedings for usurping office.** Whenever such action shall be brought against a person for usurping an office, the district attorney, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the court for the arrest of such defendant, and holding him to bail, and thereupon he shall be arrested and held to bail, in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Wait, Code, 435; Harst. Pr. 804.

§ 537. **Judgment includes claimant.** In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

Wait, Code, 436; Harst. Pr. 805.

§ 538. **Claimant takes office, when.** If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody or within his power, belonging to the office from which he shall have been excluded.

Wait, Code, 437; Harst. Pr. 806.

§ 539. **Refusal to deliver.** If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as are or may hereafter be prescribed by law.

Wait, Code, 438.

§ 540. **Damages for usurpation.** If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

Wait, Code, 439; Harst. Pr. 807.

§ 541. **Joinder of several claimants.** Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Wait, Code, 440; Harst. Pr. 808.

§ 542. **Judgment against intruder.** When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising, any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding five hundred dollars, which fine, when collected, shall be paid into the treasury of the territory.

Wait, Code, 441; Harst. Pr. 809.

§ 543. **Against corporation.** If it shall be adjudged that a corporation, against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchise, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

Wait, Code, 442.

§ 544. **Costs, how collected.** If judgment be rendered in such action against a corporation, or against a person claiming to be a corporation, the court may cause the costs therein to be collected by execution against the person claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Wait, Code, 443.

§ 545. **Closing corporate affairs.** When such judgment shall be rendered against a corporation, the court has power to restrain the corporation, to appoint a receiver of its property, and to take an account and make distribution thereof among its creditors; and the district attorney must, immediately after the rendition of such judgment, institute proceedings for that purpose.

Wait, Code, 444.

§ 546. **Judgment filed with secretary.** Upon the rendition of such judgment against a corporation, the district attorney must cause a copy of the judgment to be forthwith filed in the office of the secretary of the territory, whose duty it shall be to record the same.

Wait, Code, 445.

§ 547. **Forfeitures to territory.** Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the territory, or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the district attorney, in the district court of the county or subdivision where the property is situated.

Wait, Code, 447.

CHAPTER XXVII.

ACTION FOR THE PARTITION OF REAL PROPERTY.

§ 548. **When action brought.** When several co-tenants hold and are in possession of real property as parceners, joint-tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

Wait, Code, 448; Harst. Pr. 752; Prob. Code, 279–290; Bell v. Dangerfield, 3 N. W. Rep. 698; Hollingsworth v. Pearson, Id. 818; Connolly v. Connolly, 4 N. W. Rep. 233; Roger v. Gillett, 9 N. W. Rep. 204; Peeper v. Peeper, 10 N. W. Rep. 604; Cook v. Webb, 19 Minn. (Gil.) 129.

§ 549. **Requisites of complaint.** The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain, or contingent, or the ownership of the inheritence depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Wait, Code, 448; Harst. Pr. 753.

§ 550. **Lienors of record.** No person having a conveyance of, or claiming a lien on, the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

Harst. Pr. 754.

§ 551. **Lis pendens required.** Immediately after filing the complaint in the district court, the plaintiff must record in the office of the register of deeds of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

Harst. Pr. 755; sec. 101.

§ 552. **Summons, to whom.** The summons must be directed to all the joint tenants and tenants in common, and all persons having an interest in or any liens of record, by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

Harst. Pr. 756; secs. 550, 557; Eberts v. Fisher, 7 N. W. Rep. 211; Martin v. Parker, 14 Minn. (Gil.) 1.

§ 553. **Service by publication.** If the party having a share or interest be unknown, or any one of the unknown parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Harst. Pr. 757; sec. 104.

§ 554. **Requisites of answers.** The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also, whether the same has been secured in any other way, or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

Harst. Pr. 758.

§ 555. **Title, proofs, and judgment.** The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, as not between themselves.

Harst. Pr. 759.

§ 556. **Part partition and subdivision.** Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained or allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Harst. Pr. 760.

§ 557. **Outstanding liens—referee.** If it appear to the court by the certificate of the register of deeds, or clerk of the district court, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or, if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Harst. Pr. 761; secs. 552, 558, 550.

§ 558. **Appearance before referee—service—report.** The plaintiff must cause a notice to be served a reasonable time provious to the day for appearance before the referee appointed, as provided in the preceding section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolute thereon. In case such person be absent, or his residence be unknown, service may be made by publication or notice to his agent, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

Harst. Pr. 762.

§ 559. **Sale or partition.** If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proof being made, it must order a partition according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

Harst. Pr. 763; Branscomb v. Gillian, 7 N. W. Rep. 523.

§ 560. **Method and rules of partition.** In making the partition, referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties, or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way.

Harst. Pr. 764; Eberts v. Fisher, 7 N. W. Rep. 211.

§ 561. **Referees' report.** The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided and the share allotted to each party, with a particular description of each share.

Harst. Pr. 765; Adair v. Cummins, 12 N. W. Rep. 495.

§ 562. **Judgment on report—effect of.** The court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial [interest?] in the property, or who have an interest in any undivided share thereof as tenants for years or for life.
2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.
3. On all other persons claiming from such parties or persons, or either or them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representative, or assigns of such decedent as if it had been entered before his death.

Harst. Pr. 766.

§ 563. **Tenants not affected.** The judgment does not affect tenants for years, less than ten, to the whole of the property which is the subject of the partition.

Harst. Pr. 767.

§ 564. **Payment of expenses.** The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court; and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Harst. Pr. 768; secs. 592, 567. Fees of referees. Sec. 388.

§ 565. **Liens follow owner's share.** When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

Harst. Pr. 769.

§ 566. **Certain estates set off.** When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Harst. Pr. 770.

§ 567. **Proceeds of incumbered property applied.** The proceeds of the sale of incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

Harst. Pr. 771; McClain v. McClain, 3 N. W. Rep. 60.

§ 568. **Lienor having other security.** Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such security to be exhausted before distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

Harst. Pr. 772.

§ 569. **Distribution by referee.** The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

Harst. Pr. 773.

§ 570. **Part action continued.** When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings as in an original action.

Harst. Pr. 774.

§ 571. **Sales, how made.** All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

Harst. Pr. 775; Kemp v. Hein, 3 N. W. Rep. 831.

§ 572. **Terms of sale.** The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the real property of which it may direct a sale on credit, and for that portion of which the purchase money is required, to be invested for the benefit of unknown owners, infants, or parties out of the territory.

Harst. Pr. 776.

§ 573. **Security for purchase money.** The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, or such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares in the name of clerk of the district court, and his successors in office.

Harst. Pr. 777.

§ 574. **Estate for life or years.** The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

Harst. Pr. 778.

§ 575. **Compensation for.** If such consent be not given, filed, and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require.

Harst. Pr. 779.

§ 576. **Same unknown.** If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

Harst. Pr. 780.

§ 577. **Future estates.** In all cases of sales, where it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

Harst. Pr. 781.

§ 578. **Announcements at sale.** In all cases of sales of property, the terms must be made known at the time, and if the premises consist of distinct farms or lots, they must be sold separately.

Harst. Pr. 782.

§ 579. **Interest excludes buyers.** Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

Harst. Pr. 783.

§ 580. **Report of sale.** After completing a sale of the property, or any part thereof, ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the district court where the property is situated.

Harst. Pr. 784.

§ 581. **Order to convey.** If the sale be confirmed by the court, an order must be entered directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Harst. Pr. 785.

§ 582. **Lienor or party a purchaser.** When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Harst. Pr. 786.

§ 583. **Record and bar of conveyance.** The conveyance must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

Harst. Pr. 787.

§ 584. **Proceeds due unknown.** When there are proceeds of a sale belonging to an unknown owner, or to a person without the territory who has no legal representative within it, the same must be invested in bonds of the United States, for the benefit of the persons entitled thereto.

Harst. Pr. 788.

§ 585. **Securities run to clerk.** When the security of the proceeds of the sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

Harst. Pr. 789.

§ 586. **Security to parties.** When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipts therefor. Such agreement and receipt must be returned and filed with the clerk.

Harst. Pr. 790.

§ 587. **Clerk's duty.** The clerk of the district court, in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all the securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Harst. Pr. 791.

§ 588. **Compensation for inequality.** When it appears that the partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Harst. Pr. 792.

§ 589. **Infant's share.** When the share of an infant is sold the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the especial guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

Harst. Pr. 793.

§ 590. **Insane and incompetent.** The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will faithfully discharge the trust imposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Harst. Pr. 794; sec. 80.

§ 591. **Guardian's powers.** The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, who is interested in real property held in joint tenancy, or in common, or in any other manner, so as to authorize his being made a party to an action for the partition of, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

Harst. Pr. 795.

§ 592. **Fees and disbursements.** The costs of partition, including reasonable counsel fees expended by the plaintiff or either of the defendants for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties there, or any of them.

Harst. Pr. 796; secs. 564, 567, 379, 388.

§ 593. **Single referee.** The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under this chapter; and the single referee, when thus appointed, has all the powers, and may perform all the duties required, of the three referees.

Harst. Pr. 797.

§ 594. **Abstract of title—cost of same.** If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties, must be allowed and taxed. Whenever such abstract is produced by the plaintiff before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same, and where it will be kept when finished.. The court, or the judge thereof, may direct from time to time, during the progress of the action, who shall have the custody of the abstract.

Harst. Pr. 799.

§ 595. **Who makes abstracts.** The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the register of deeds or other officer, but instead thereof, it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court.

Harst. Pr. 800.

§ 596. **Interest on disbursements.** Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

Harst. Pr. 801.

CHAPTER XXVIII.

FORECLOSURE OF MORTGAGES.

FORECLOSURE BY ADVERTISEMENT.

§ 597. **Power of sale.** Every mortgage of real property containing therein a power of sale, upon default being made in the condition of such mortgage, may be foreclosed by advertisement in the cases and manner hereinafter specified: *provided*, that when the mortgagee or his assignee has commenced procedure by advertisement, and it shall be made appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counter-claim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin the mortgagee or his assignee from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject-matter; and for the purpose of carrying out the provisions of this act, service may be made upon the attorney or agent of the mortgagee or assignee. (*As amended March 6, 1883.*)

Harst. Pr. 726; Civil Code, Dak. 1743, 1734, 1772, 1773–1776; Everett v. Buchanan, 6 N. W. Rep. 439, and 8 N. W. Rep. 35; Lowry v. Hurd, 7 Minn. (Gil.) 282.

§ 598. **Requisites of proceeding.** To entitle any party to give notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have accrued by which the power to sell has become operative.

2. That no action or proceedings shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or, if any action or proceeding has been instituted, that the same has been discontinued, or that an execution, upon the judgment rendered therein, has been returned unsatisfied, in whole or in part; and,

3. That the mortgage containing such power of sale has been

duly recorded, and, if it shall have been assigned, that all the assignments thereon have been duly recorded in the county where such mortgaged premises are situated.

Everett v. Buchanan, 6 N. W. Rep. 439; Standish v. Vosberg, Id. 489; Bresnahan v. Bresnahan, 1 N. W. Rep. 39; Dick v. Moon, 4 N. W. Rep. 39; Hebert v. Bulte, Id. 215; Fowler v. Woodward, Id. 231; Hayes v. Lieulokken, Id. 584; Taylor v. Burgess, 6 N. W. Rep. 350; Reading v. Waterman, 8 N. W. Rep. 691; Louder v. Burch, 10 N. W. Rep. 129; Hayes v. Frey, 11 N. W. Rep. 695; Misener v. Gould, 11 Minn. (Gil.) 105; Carli v. Taylor, 15 Minn. (Gil.) 131; Morrison v. Mendenhall, 18 Minn. (Gil.) 212; Thorpe v. Merrill, 21 Minn. 336.

§ 599. **Installments taken separate.** In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage, after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage, for each of such installments, may be foreclosed in the same manner, and with like effect, as if such separate mortgage were given for each such subsequent installment; and a redemption of any such sale shall have the like effect as if the sale for such installment had been made upon a prior, independent mortgage.

Harst. Pr. 728; Fowler v. Johnson, 3 N. W. Rep. 986; Standish v. Vosberg, 6 N. W. Rep. 489; Daniels v. Smith, 4 Minn. (Gil.) 117; Borup v. Nininger, 5 Minn. (Gil.) 417; Watkins v. Hackett, 20 Minn. (Gil.) 92.

§ 600. **Publishing notice.** Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, must be given by publishing the same for six successive weeks, at least once in each week, in a newspaper of the county where the premises intended to be sold, or some of them, are situated, if there be one, and, if not, then in the nearest newspaper published in the territory.

Sec. 601; Perkins v. Keller, 4 N. W. Rep. 559; Snyder v. Hemingway, 11 N. W. Rep. 381; Lowell v. North, 4 Minn. (Gil.) 15; Atkinson v. Duffy, 16 Minn. (Gil.) 30; Goenen v. Schroeder, 18 Minn. (Gil.) 51; Pratt v. Tinkcom, 21 Minn. 142.

§ 601. **Contents of same.** Every notice must specify:

1. The names of the mortgagor and mortgagee, and the assignee, if any.
2. The date of the mortgage.
3. The amount claimed to be due thereon at the date of the notice.
4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage; and,
5. The time and place of sale.

Cook v. Wiles, 4 N. W. Rep. 169; Reading v. Waterman, 8 N. W. Rep. 691; Snyder v. Hemingway, 11 N. W. Rep. 381; Jones v. Pashby, 12 N. W. Rep. 884; Baldwin v. Allison, 4 Minn. (Gil.) 11; Dana v. Farrington, Id. 335; Ramsey v. Merriam, 6 Minn. (Gil.) 104; Banning v. Armstrong, 7 Minn. (Gil.) 31; Heath v. Hall, 7 Minn. (Gil.) 243; Jones v. Cooper, 8 Minn. (Gil.) 294;

Simmons v. Fuller, 17 Minn. (Gil.) 462; Golcher v. Brisbin, 20 Minn. (Gil.) 407; Thorpe v. Merrill, 21 Minn. 336; Lowell v. North, 4 Minn. (Gil.) 15; Spencer v. Annan, Id. 426.

§ 602. **Manner of sale.** The sale must be at public auction, between the hours of nine o'clock in the forenoon and the setting of the sun on that day, in the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff, or his deputy, of the county, to the highest bidder.

Civil Code, Dak. 1713; Baldwin v. Allison, 4 Minn. (Gil.) 11; Berthold v. Holman, 12 Minn. (Gil) 221; Atkinson v. Duffy, 16 Minn. (Gil.) 30.

§ 603. **Postponement of sale.** Such sale may be postponed, from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until such time to which the sale shall be postponed, at the expense of the party requesting such postponement.

Miller v. Miller, 12 N. W. Rep. 209.

§ 604. **Separate sales of tracts.** If the mortgaged premises consist of distinct farms, tracts, or lots, they must be sold separately, and no more farms, tracts, or lots must be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest, and the costs and expenses allowed by law.

Civil Code, Dak. 1713; Worley v. Naylor, 6 Minn. (Gil.) 123; McVeigh v. Sherwood, 11 N. W. Rep. 379.

§ 605. **Mortgagee may purchase.** The mortgagee, his assigns, or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

Ramsey v. Merriam, 6 Minn. (Gil.) 104; Allen v. Chatfield, 8 Minn. (Gil.) 386.

§ 606. **Certificate of sale.** Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer or person making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.

And such officer or person shall file in the office of the register of deeds where the mortgage is recorded, within ten days from the day of sale, a duplicate of such certificate; which certificate must be executed and acknowledged, and may be recorded as provided in case of a certificate of sale of real property upon execution, and shall have the same validity and effect.

§ 607. **Redemption—by whom—rights.** The property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter XIII of this Code for redemption of real property sold upon execution, so far as the sale may be applicable by:

1. The mortgagor or his successor in interest in the whole or any part of the property.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner, and has all the rights of a redemptioner under that chapter.

And the mortgagor and his successor in interest has all the rights of the judgment debtor and his successor in interest as provided therein.

Sec. 633; Daniels v. Smith, 4 Minn. (Gil.) 117; Dickinson v. Dickinson, 1 N. W. Rep. 834; Iowa Co. v. Buson, 7 N. W. Rep. 597; Daniels v. Smith, 4 Minn. (Gil.) 117; Goenen v. Schroeder, 18 Minn. (Gil.) 51; Watkins v. Hackett, 20 Minn. (Gil.) 92; King v. Meighen, Id. 237; Everett v. Buchanan, 8 N. W. Rep. 36.

§ 608. **Notice to officer.** The notice of redemption required to be given to the sheriff under that chapter, may, in foreclosure by advertisement, be given to the officer or person making the sale.

Secs. 344–353, 633.

§ 609. **Deed.** If such mortgaged premises be not redeemed, it shall be the duty of the officer, or his successor in office, or other person, who sold the same, or his executors or administrators, or some other person appointed by the district court for that purpose, to complete such sale, by executing a deed of the premises so sold to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser, by redemption or otherwise.

Sec. 623: Miller v. Miller, 12 N. W. Rep. 209; Donnelly v. Simonton, 7 Minn. (Gil.) 110.

§ 610. **Overplus.** If, after any such sale, there remain in the hands of the officer, or other person making the sale, any surplus money, after satisfying the mortgage on such real property sold, and payment of the costs and expenses of such forclosure and sale, the surplus must be paid over by such officer or other person, on demand, to the mortgagee, his legal representatives or assigns.

Harst. Pr. 727; Bailey v. Merritt, 7 Minn. (Gil.) 102; Ayer v. Stewart, 14 Minn. (Gil.) 68.

§ 611. **Record evidence of sale.** Any party desiring to perpetuate the evidence of any such sale, made in pursuance of these provisions, may proceed:

1. An affidavit of the publication of the notice of the sale, and of any notice of postponement, may be made by the printer or publisher

of a newspaper in which such notice was published, or some person in his employ knowing the facts.

2. An affidavit of the fact of any sale pursuant to such notice to be made by the person who acted as auctioneer at the sale, stating the time and place, the sum bid, and the name of the purchaser.

The affidavits specified in this section may be taken and certified by any officer authorized to administer oaths.

Secs. 612, 107, 490.

§ 612. **Affidavits recorded.** Such affidavits must be recorded at length by the register of deeds of the county in which the real property is situated, in a book kept for the record of mortgages, and such original affidavits, the record thereof, and certified copies of such record, shall be *prima facie* evidence of the facts therein contained.

Sec. 611.

§ 613. **Reference note.** A note referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence in the margin of the record of such mortgage.

§ 614. **Effect of record and deed.** A record of the affidavits aforesaid, and the deed executed upon the sale of the real property, shall vest in the purchaser or person acquiring title thereto, by redemption or otherwise, the same force and validity as the deed upon foreclosure by action provided for in section 623 of this Code.

§ 615. **Party foreclosing entitled to costs.** The party foreclosing a mortgage by advertisement shall be entitled to his costs and disbursements out of the proceeds of the sale, and shall also be entitled, in addition, to any attorney fee agreed upon in the mortgage, upon the making by the attorney, or, if more than one, by one of the attorneys, employed to foreclose, and filing with the register of deeds, at or prior to the time of sale, of an affidavit to the effect that such attorney or attorneys have been in good faith employed to foreclose; that the full amount of such fee inures to his or their benefit; that no agreement or understanding for any division thereof has been made with any other person; and that no part thereof is or has been agreed to be paid to the party foreclosing. (*As amended February 13, 1883.*)

Secs. 377, 378, 624.

FORECLOSURE BY ACTION.

§ 616. **Where realty situate—service of process.** Actions for the foreclosure or satisfaction of mortgages may be brought in the district court of the county or judicial subdivision where the mortgaged real property, or some portion thereof, is situated; and in case any defendant be not a resident of the county or subdivision, process may be served on him in any other county or subdivision within the territory; or, if he be a non-resident of the territory, or absent, or concealed, the same proceedings may thereupon be had as are provided by this Code in such cases.

Harst. Pr. 392; secs. 92, 104; Civil Code, Dak. 1713; Walton v. Hollywood, 11 N. W. Rep. 209; McMann v. Westcott, 10 N. W. Rep. 190; Foster v. Henderson, 1 N. W. Rep. 596; Dick v. Moon, 4 N. W. Rep. 39; Forrer v. Kloke, 6 N. W. Rep. 428.

Administrator may foreclose. Jones v. Null, 1 N. W. Rep. 867; White v. Secor, 12 N. W. Rep. 586; Bell v. Pate, 11 N. W. Rep. 275.

Who to be made parties defendant. See secs. 82 and 83, and notes, 619 and 638; Merriman v. Hyde, 2 N. W. Rep. 218; Hurley v. Cox, Id. 705; Nims v. Sherman, 4 N. W. Rep. 434; Zaegel v. Kuster, 7 N. W. Rep. 781; Botsford v. Botsford, 12 N. W. Rep. 897; Macloon v. Smith, 5 N. W. Rep. 336; Forrer v. Kloke, 6 N. W. Rep. 428.

Defenses.

Sec. 597. Infancy. Terry v. McClintock, 2 N. W. Rep. 787. Want of notice. Brown v. Conger, 4 N. W. Rep. 1009; Brockway v. Newton, 5 N. W. Rep. 781. Duress. Macloon v. Smith, 5 N. W. Rep. 336. Failure of consideration. Dicken v. Morgan, 7 N. W. Rep. 145. Imperfect description. Botsford v. Botsford, 12 N. W. Rep. 897. Usury. Taylor v. Burgess, 6 N. W. Rep. 350.

Other defenses.

Mally v. Mally, 3 N. W. Rep. 670; Henry v. Evans, 9 N. W. Rep. 216; Maxfield v. Willy, Id. 271; Forrer v. Kloke, 6 N. W. Rep. 428; Lash v. McCormick, 17 Minn. (Gil.) 381.

§ 617. **Judgment includes.** Whenever an action shall be brought for the foreclosure or satisfaction of a mortgage, the court shall have power to render a judgment against the mortgagor for the amount of the mortgage debt due at the time of the rendition of such judgment and the costs of the action, and to order and decree a sale of the mortgaged premises, or such part thereof as may be sufficient to pay the amount so adjudged to be due, and costs of sale, and shall have power to order and compel the delivery of the possession of the premises to the purchaser; but in no case under this chapter shall the possession of the premises so sold be delivered to the purchaser or person entitled thereto until after the expiration of one year from such sale, and the court may direct the issuing of an execution for the balance that may remain unsatisfied after applying the proceeds of such sale.

Harst. Pr. 726; secs. 619, 628, 598, 309, 312, (Redemption.) 607, 633; Davenport Plow Co. v. Mewis, 4 N. W. Rep. 1059; Olinger v. Liddle, 13 N. W. Rep. 703; Johnson v. Van Velsor, 5 N. W. Rep. 265; Powers v. Golden Lumber Co. Id. 656; Johnson v. Payne, 9 N. W. Rep. 81; Maxfield v. Willey, Id. 271; Broquet v. Sterling, Id. 301; Ransom v. Sutherland, Id. 530; Hanford v. Robertson, 10 N. W. Rep. 126; Ketchum v. Breed, 11 N. W. Rep. 238; Gilbert v. Haire, 5 N. W. Rep. 321.

§ 618. **Action exclusive.** After such action shall be commenced, while the same is pending, no proceedings at law shall be had for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.

Sec. 598.

§ 619. **Other party.** If the mortgage debt be secured by the obligation, or other evidence of debt, of any other person than the mortgagor, the plaintiff may make such other person a party to the action, and the court may render judgment for the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as against the mortgagor, and may enforce such judgment as in other cases, by execution or other process.

Secs. 136, 617.

§ 620. **Complaint to state.** In an action for the foreclosure or satisfaction of a mortgage, the complaint shall state whether any proceedings have been had at law or otherwise for the recovery of the debt secured by such mortgage, or any part thereof; and if there has, whether any and what part thereof has been collected.

Secs. 621, 598.

§ 621. **Judgment at law.** If it appear that any judgment has been obtained in an action at law for the moneys demanded by such complaint, or any part thereof, no proceedings shall be had in such case unless an execution against the property of the defendant in such judgment has been issued, and the sheriff or other officer shall have made return that the execution is unsatisfied in whole or in part, and that the defendant has no property whereon to satisfy such execution.

§ 622. **Sales, by whom and where.** All sales of mortgaged premises, under an order and decree of foreclosure, must be made by a referee, sheriff, or his deputy, of the county or subdivision where the court, in which the judgment or decree is rendered, is held, or other person appointed by the court for that purpose, and must be made in the county or subdivision where the premises, or some part of them, are situated, and shall be made upon the like notice and in the same manner as provided by law for the sale of real property upon execution.

Civil Code, Dak. 1713; secs. 335–342; Kopmeier v. O'Neil, 3 N. W. Rep. 365; Miller v. Lefever, 4 N. W. Rep. 929; Hubbard v. Taylor, Id. 1066; Everett v. Buchanan, 8 N. W. Rep. 31; McVeigh v. Sherwood, 11 N. W. Rep. 379; Snyder v. Hemingway, Id. 381.

§ 623. **Certificate of sale—deed and effect.** Whenever any real property shall be sold under an order, decree, or judgment of foreclosure, under the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale, as provided by section 606 of this Code; and at the expiration of the time for the redemption of such mortgaged premises, if the same be not redeemed, the person or officer making the sale, or his successor in office, or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of such purchaser, by redemption or otherwise, a deed or deeds to such premises, which shall vest in the purchaser, or other party entitled thereto, the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter; and such deed shall be as valid as if executed by the mortgagor and mortgagee, and shall be a complete bar against each of them, and against all the parties to the action in which the judgment for such sale was rendered, and against their heirs respectively, and all persons claiming under such heirs.

Secs. 609, 606. 342, 354, 599, 647; Tott v. Johnson, 1 N. W. Rep. 498; Fowler v. Johnson, 3 N. W. Rep. 986; Folsom v. Lockwood, 6 Minn. (Gil.) 119.

§ 624. **Proceeds—overplus.** The proceeds of every such sale must be applied to the discharge of the debt adjudged by the court to be due, and of the costs; and if there be any overplus, it must be brought into court for the use of the defendant or of the person entitled thereto, subject to the order of the court.

Harst. Pr. 727; secs. 610, 625, 615; Pierce v. Shaw, 8 N. W. Rep. 209; Hanford v. Robertson, 10 N. W. Rep. 125; Millard v. Truax, Id. 358.

§ 625. **Same.** If such overplus, or any part thereof, shall remain in court, for the term of three months, without being applied for, the judge of the district court may direct the same to be put at interest, for the benefit of the defendant, his representatives or assigns, subject to the order of the court.

Harst. Pr. 727; sec. 624.

§ 626. **Part payment.** Whenever an action shall be commenced for the foreclosure of a mortgage upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the complaint shall be dismissed upon the defendant's bringing into court, at any time before decree of sale, the principal and interest due, with costs and disbursements.

Sec. 627.

§ 627. **Same before sale.** If, at any time before sale, the defendant shall bring into court the principal and interest due, with cost, the proceedings in such action shall be stayed until a further default, and in case of a subsequent default in the *judgment* [payment] of any of the installments, or any part thereof, of such mortgage, the court may enforce, by order or other process, the collection of such subsequent installment.

Sec. 626; Schroeder v. Laubenheimer, 7 N. W. Rep. 427; Balme v. Wambaugh, 16 Minn. (Gil.) 106.

§ 628. **Referee view premises.** If the defendant shall not bring into court the amount due, with costs, or if, for any other cause, a judgment or decree shall be entered for the plaintiff, the court may appoint a referee to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony, and if it shall appear that the same can be sold in parcels, without injury to the interests of the parties, the decree must direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs, and such judgment or decree shall remain as security for any subsequent default.

Secs. 629, 630, 631; Civil Code, Dak. 1713.

§ 629. **Successive judgments and sales.** If, in the case mentioned in the preceding section, there shall be any default, subsequent to such judgment or decree, in the payment of any portion or installment of the principal, or of any interest due upon such mortgage, the court may, upon the application of the plaintiff, by a further order founded upon such first judgment or decree, direct a sale of so much of the mortgaged premises to be made, under such decree, as will be sufficient to satisfy the amount so due, with costs of the application and the subsequent proceedings thereon; and the same proceedings may be had as often as a default happen.

Harst. Pr. 728; secs. 628, 599, 630, 631; Civil Code, Dak. 1713.

§ 630. **Sale of whole on first default.** If, in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the judgment or decree must, in the first instance, be entered for the sale of the whole premises accordingly.

Harst. Pr. 728; Civil Code, Dak. 1713; sec. 599; Lausman v. Drahas, 1 N. W. Rep. 445; Fowler v. Johnson, 3 N. W. Rep. 986.

§ 631. **Rebate on undue part.** In such case the proceeds of such sale must be applied as well to the interest or portion or installment of the principal due, as towards the whole or residue of the sum secured by such mortgage, and not due and payable at the time of such sale, and if such residue do not bear interest, then the court may direct the same to be paid, with a rebate of the legal interest for the time during which residue shall not be due and payable, or the court may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest for the benefit of the plaintiff, to be paid to him as the installments or portions of the principal or interest may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them by order of the court.

Sec. 599.

§ 632. **Appeals.** Appeals to the supreme court may be taken in actions for the foreclosure of mortgages in the same manner as in other civil actions.

§ 633. **Redemption.** All real property sold upon foreclosure of mortgages, by order, judgment, or decree of court, may be redeemed at any time within one year after such sale, as prescribed by section six hundred and thirty-five (six hundred and seven) of this chapter, upon foreclosure by advertisement.

Sec. 607; Dickinson v. Hayes, 1 N. W. Rep. 834; Carroll v. Rossiter, 10 Minn. (Gil.) 141.

§ 634. **Restraint of injury.** The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the existence of the lien or foreclosure of a mortgage thereon, and until the expiration of the time allowed for redemption.

Harst. Pr. 745; secs. 189, 372, 352.

CHAPTER XXIX.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER ACTIONS CONCERNING REAL ESTATE.

§ 635. **Ejectment.** An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Wait, Code, 449, 455; Harst. Pr. 738; Kent v. Lasley, 4 N. W. Rep. 23; Board of Health v. City of East Saginaw, 7 N. W. Rep. 808; Kingman v. Graham, 8 N. W. Rep. 181; Reading v. Waterman, Id. 691; Hewitt v. Butterfield, 9 N. W. Rep. 15; Carmichael v. Argard, Id. 470; Sherin v. Larson, 11 N. W. Rep. 70; Snyder v. Hemmingway, Id. 381; Lord v. Deering, 24 Minn. 110; Hemmingway v. Drew, 11 N. W. Rep. 382; Hendricks v. Rasson, 13 N. W. Rep. 367; City of Winona v. Huff, 11 Minn. (Gil.) 75; Demill v. Moffatt, 15 N. W. Rep. 387; Pace v. Chadderdon, 4 Minn. (Gil.) 390; Merrill v. Deering, 22 Minn. 376.

§ 636. **Default—no costs.** If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Harst. Pr. 739.

§ 637. **Description.** In an action for the recovery of real property it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

May v. Ry. Co. 26 Minn. 74; Toogood v. Hoyt, 4 N. W. Rep. 445; White v. Hapeman, 5 N. W. Rep. 313.

§ 638. **Joinder of defendants.** In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

Secs. 82 and 83; Anderson v. Courtwright, 10 N. W. Rep. 183.

§ 639. **Of plaintiffs.** Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Harst. Pr. 381, 384; secs. 81, 82, and 83; Lewis v. Soule, 2 N. W. Rep 400; Willis v. Sweet, 5 N. W. Rep. 895; Walton v. Perkins, 10 N. W. Rep 434; Jenks v. Hathaway, 12 N. W. Rep. 691.

§ 640. **Right failing after action.** In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

Harst. Pr. 740.

§ 641. **Improvements in good faith.** In an action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim by such defendant.

Harst. Pr. 741; secs. 642, 643, 119; Uhlig v. Garrison, 2 N. W. Rep. 258; Burkle v. Judge of Fourth Circuit, 4 N. W. Rep. 192; Kidd v. Guild, 12 N. W. Rep. 158; Reed v. Newton, 22 Minn. 541.

§ 642. **Same—how pleaded.** The counter-claim in such action must set forth, among other things, the value of the land, aside from the improvements thereon, and also as accurately as practicable the improvements upon the land and the value thereof.

Uhlig v. Garrison, 2 N. W. Rep. 258.

§ 643. **Specific findings.** Issues may be joined and tried as in other actions, and the value of the land, aside from the value of the improvements thereon, and the separate value of the improvements, must be specifically found by the verdict of the jury, the report of the referee, or the findings of the court.

Secs. 262, 263; Search v. Miller, 1 N. W. Rep. 975; Uhlig v. Garrison, 2 N. W. Rep. 258.

§ 644. **Cross-judgments—adjustment.** The judgment of the court upon such finding, if in favor of the plaintiff, for the recovery of the real property, and in favor of the defendant for the counterclaim, shall require such defendant to pay to the plaintiff the value of the land as determined by such finding, and the damages, if any, recovered, for withholding the same, and for waste committed upon such land by the defendant, within 60 days from the rendition of such judgment, and, in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements as determined by such finding, less the amount of any damages so recovered by plaintiff for withholding the property, and for any waste committed upon such land by the defendant, and until such payment or tender, and deposit in the office of the clerk of the court in which such action is pending, no execution or other process shall issue in such action to dispossess such defendant, his heirs or assigns.

Secs. 305, 292; Galloher v. Pendleton, 7 N. W. Rep. 512; Irvine v. Myers, 6 Minn. (Gil.) 398.

§ 645. **Right of entry.** The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property, and make survey and measurement thereof, and of any tunnels, shafts, or drifts thereon, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

Harst. Pr. 742.

§ 646. **Order for—service.** The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

Harst. Pr. 743; secs. 560–562. Description. Sec. 637.

§ 647. **Purchaser under execution.** When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyances.

Harst. Pr. 746; secs. 623, 352, 634, 652.

§ 648. **Alienation not to affect action.** An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Harst. Pr. 747; sec. 85; Michigan Cent. Ry. Co. v. McNaughton, 7 N. W. Rep. 712.

§ 649. **Mining customs.** In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this territory and of the United States, must govern the decision of the action.

Harst. Pr. 748.

§ 650. **Occupying claimants.** Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done the same; also an action to recover the possession thereof, in the same manner as if he possessed a fee-simple title to said lands.

CHAPTER XXX.

ACTION FOR NUISANCE, WASTE, AND WILLFUL TRESPASS ON REAL PROPERTY.

§ 651. **Nuisance defined — who may bring action.** Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Wait, Code, 453, 454; Harst. Pr. 731; Messersmidt v. People, 9 N. W. Rep. 485.

Notice. Thornton v. Smith, 11 Minn. (Gil.) 1; Bartlett v. Simon, 24 Minn. 448. What constitutes. Dorman v. Ames, 12 Minn. (Gil.) 347; Harrington v. Ry. Co. 17 Minn. (Gil.) 188; Cleveland v. City of St. Paul, 18 Minn. (Gil.) 255; Minneapolis Mill Co. v. Tiffany, 22 Minn. 463; Pennoyer v. Allen, 14 N. W. Rep. 609; Pierce v. Wagner, 13 N. W. Rep. 170; Cain v. Ry. Co. 6 N. W. Rep. 268.

§ 652. **Waste—when actionable.** If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the premises.

Wait, Code, 450; Harst. Pr. 732; secs. 352, 634.
What is not waste. Sec. 352.

§ 653. **To whom judgment given.** Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice.

Wait, Code, 452.

CHAPTER XXXI.

ACTION TO ENFORCE MECHANICS' LIENS.

§ 654. **No lien.** No person is entitled to a mechanic's lien who takes collateral security on the same contract.

§ 655. **Lien, to whom and for what.** Every mechanic or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection, or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

Sec. 669; Harst. Pr. 1183, 1185; Civil Code, Dak. 1814; Moritz v. Splitt, 13 N. W. Rep. 555; Cummings v. Halsted, 1 N. W. Rep. 1052; Willer v. Bergenthal, 7 N. W. Rep. 352; Nat. Bank of Waterloo v. Elmore, 3 N. W. Rep. 137; McDonald v. Minneapolis Lumber Co. 9 N. W. Rep. 765; O'Neil v. Anderson, 4 N. W. Rep. 47; Wright v. Hood, 5 N. W. Rep. 488; Nordyke v. Hawkeye Woolen Mills Co. Id. 693; Brown v. Wyman, 9 N. W. Rep. 344; Chicago Lumber Co. v. Woods, 5 N. W. Rep. 715; Whiting v. Story County, 6 N. W. Rep. 137; Smith v. Iowa Loan & Building Ass'n, 14 N. W. Rep. 221; Hammond v. Wells, 7 N. W. Rep. 218; Freeman v. Getchell, 8 N. W. Rep. 764; Spruhen v. Stout, 9 N. W. Rep. 277; Rugg v. Hoover, 10 N. W. Rep. 473; German Bank v. Schloth, 13 N. W. Rep. 314.

§ 656. **Proceedings by subcontractors.** Every subcontractor wishing to avail himself of the benefits of this chapter shall, within sixty days after the material shall have been furnished or labor performed, file with the clerk of the district court of the county or judicial subdivision in which the building, erection, or other improvement to be charged with the lien is situated, a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by his affidavit. But a failure to file the same within the time aforesaid shall not defeat the lien except as against purchasers or incumbrancers in good faith and without notice, whose rights accrued after the sixty days, and before any claim for the lien was filed, or against the owners, except the amount due to contractor at the time of filing the same. (*As amended March 9, 1883.*)

Harst. Pr. 1187; secs. 658, 662; Nelson v. Ry. Co. 1 N. W. Rep. 435; Kruse v. Thompson, 4 N. W. Rep. 814; Burdick v. Moulton, 6 N. W. Rep. 48; Winter v. Hudson, Id. 541; Robinson v. Ins. Co. 8 N. W. Rep. 314; Sandval v. Ford, 8 N. W. Rep. 324; Valentine v. Ranson, 10 N. W. Rep. 338; Bohn v. McCarthy, 11 N. W. Rep. 127; German Bank v. Schloth, 13 N. W. Rep. 314.

§ 657. **Notice presumed—lien filed in sixty days—limitation.** Every railway owner, company, or contractor and subcontractor, upon any railway, shall be deemed to have the notice provided for by the preceding section for a period of sixty days from the last day of the month in which such labor was done, or material furnished, during which period any person who has performed such labor or furnished such material may file a lien with the clerk of the district court as provided in the preceding section, which lien shall be binding upon the erection, excavation, embankment, bridge, roadbed, or right of way, and upon all land upon which the same may be situated, to the full value of such labor or material, in the county or judicial subdivision in which the same is filed. In case the lien is sought to be enforced against the owner, the liability shall not be greater than his liability would have been to the owner at the time the labor was performed or material furnished; but the liability of the owner, in case actual notice shall be given after sixty days, shall be the same as provided in this chapter.

Harst. Pr. 1187, 1189, 1193; Nelson v. Railroad Co. 1 N. W. Rep. 435; Neilson v. Ry. Co. 3 N. W. Rep. 779; Vaughn v. Smith, 12 N. W. Rep. 604.

§ 658. **Lien in six months — affidavit — statement.** Every subcontractor may, at any time within six months after his labor is performed or materials furnished, make a statement thereof in writing, supported by affidavit that the same is just and true, and file the same with the clerk of the district court of the proper county or judicial subdivision, and give notice thereof, with a copy of such statement, to the owner, his agent or trustee, and to the contractor; and from and after the service of such notice, his lien therefor shall have the same force and effect, and be prosecuted in like manner, as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor at the time of the service of such notice upon the owner, his agent or trustee.

Harst. Pr. 1187; sec. 656.

§ 659. **If settlement refused.** In case the contractor shall refuse to make and sign such settlement, then the subcontractor may make a just and true statement of the labor done, or things furnished, giving all credits, which he shall present to the owner, his agent, or trustee, and shall also, within said thirty days, file a copy of the same, verified by affidavit, with the clerk of the district court of the county or judicial subdivision in which the building, erection, or other improvement is situated, together with a correct description of the property to be charged with the lien.

§ 660. **Effect of certificate.** The certificate of settlement or statement of the subcontractor shall be a justification to the owner in withholding from the contractor the amount appearing thereby to be due the subcontractor until the same has been paid, and the owner shall become the surety of the contractor to the subcontractor for the amount due, to the extent before provided.

§ 661. **Service of notices.** The notices mentioned in this chapter may be served by any sheriff or constable, and the return thereon shall be received in evidence without further proof.

Sec. 524.

§ 662. **Liens of other persons.** Every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk of the district court of the county or judicial subdivision in which the building, erection, or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the ninety days, and before any claim for the lien was filed.

Sec. 656.

§ 663. **Clerk's record—entries.** The clerk of the district court shall indorse upon every account the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indorsed, containing the date of its filing, the name of the person filing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

§ 664. **Priority of liens.** The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon said building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or other improvement.

Phelps v. Pope, 6 N. W. Rep. 42; Denison v. Shuler, 11 N. W. Rep. 402; Justice v. Parker, 12 N. W. Rep. 553; German Bank v. Schloth, 13 N. W. Rep. 314.

§ 665. **Extent of liens—on leased land.** The entire land upon which any such building, erection, or other improvement is situated, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter, to the extent of all the right, title, and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished; and when the interest owned in said land by such owner of such building, erection, or other improvement is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as it concerns such buildings, erections, and improvements, but the same may be sold to satisfy said lien, and be removed within thirty days after the sale thereof by the purchaser.

Sec. 669; Civil Code, Dak. 583.

§ 666. **Lien superior to mortgage, when.** The lien for the things aforesaid, or work, shall attach to the buildings, erections, or improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

Harst. Pr. 1186; Denison v. Shuler, 11 N. W. Rep. 402.

§ 667. **Where actions may be brought—consolidation of liens.** Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of the county or judicial subdivision where the property is situated; and any number of persons claiming liens against the same property may join in the same action, and when separate claims are commenced the court may consolidate them. The court may also allow as part of the costs the money paid for filing each lien, and the sum of five (5) dollars for drawing the same. (*As amended March 9, 1883.*)

Harst. Pr. 1197.

§ 668. **Demand upon lienor.** Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien, such suit shall be commenced in thirty days thereafter or the lien shall be forfeited.

§ 669. **Owner defined.** Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the word "owner" thereof.

§ 670. **Satisfaction of liens—penalty.** Whenever a lien has been claimed by filing the same in the clerk's office, and it is afterwards paid, the creditor shall acknowledge the satisfaction thereof on the proper book in such office, or otherwise, in writing; and if he neglects to do so for ten days after demand, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of the injury.

§ 671. **Subcontractor defined.** All persons furnishing things or doing work provided for by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

LIENS FOR KEEPING AND PASTURING STOCK.

§ 672. **Who have liens.** Any farmer, ranchman, or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle, or sheep shall be intrusted for the purpose of feeding, herding, pasturing, or ranching, shall have a lien upon said horses, mules, cattle, or sheep for the amount that may be due for such feeding, herding, pasturing, or ranching, and shall be authorized to retain possession of such horses, mules, cattle, or sheep until the said amount is paid: *provided,* that these provisions shall not be construed to apply to stolen stock.

§ 673. **Lien only against owner.** The provisions of this act shall not be construed to give any farmer, ranchman, or herder of cattle, tavern keeper, or livery stable keeper, any lien upon horses, mules, cattle, or sheep, put into their keeping, for the purpose mentioned in the previous section, when said property was not owned by the person intrusting the same at the time of delivering them into the possession of said farmer, ranchman, herder, tavern keeper, or livery stable keeper.

CHAPTER XXXII.

ACTION TO FORECLOSE LIENS ON CHATTELS.

§ 674. **Who may maintain—requisites of judgment.** An action to foreclose a lien upon a chattel may be maintained by an innkeeper, boarding-house keeper, mechanic, workman, bailee, or other person having a lien at common law or under the statutes of this territory. A judgment in favor of the plaintiff must specify the amount of the lien, and direct a sale of the chattel, to satisfy the same and costs, by the sheriff or other officer of the court, in like manner as when the sheriff sells personal property under execution, and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the judgment and costs. The judgment must also provide for the payment of the surplus to the owner of the chattel, and for the safe-keeping of such surplus if necessary, until it is claimed by him.

Harst. Pr. 726, 727; Civil Code, Dak. 1771–1782.
Everett v. Buchanan, 8 N. W. Rep. 31.

§ 675. **Justice's jurisdiction.** A justice of the peace has jurisdiction of such action in all cases to enforce liens upon personal property where the amount of the lien claimed is less than one hundred dollars, concurrent with the district court: *provided,* this chapter shall not be construed to affect any other existing right or remedy to foreclose or enforce a lien upon a chattel.

CHAPTER XXXIII.

DAMAGES FOR INJURIES TO PERSONS AND PROPERTY.

§ 676. **Loss of life by railroad.** If the life of any person, not in the employment of a railroad corporation, shall be lost, in this territory, by the reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their employes or agents, the personal representatives of the person whose life is so lost, may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue.

Harst. Pr. 377; McKean v. Railroad Co. 17 N. W. Rep. 505; Poole v. Ry. Co. 11 N. W. Rep. 15; Howland v. Ry. Co. Id. 529; Ballou v. Ry. Co. Id. 559; Allen v. Ry. Co. Id. 614; Gradin v. Ry. Co. 14 N. W. Rep. 881; Ransier v. Ry. Co. Id. 883.

§ 677. **Who may sue—punitive damages.** If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporation, their or his agents, or servants or employes, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.

Harst. Pr. 376, 377; sec. 681; Regan v. Ry. Co. 8 N. W. Rep. 292; Schwartz v. Judd, 10 N. W. Rep. 208; Fitt's Adm'r v. Waldeck, 8 N. W. Rep. 363; Benton v. Ry. Co. Id. 330; Jucker v. Ry. Co. Id. 862; Townley v. Ry. Co. 11 N. W. Rep. 55; Marcott v. Ry. Co. 10 N. W. Rep. 53; Laverenz v. Ry. Co. Id. 268.

§ 678. **For stock injured.** All railroad corporations in this territory shall pay full damages to the owner or owners of horses and other stock and cattle that they may negligently or carelessly kill or damage by their cars, locomotives, agents, or employes, along said railroad or its branches, within the territory of Dakota.

Sec. 681; Gillman v. Ry. Co. 3 N. W. Rep. 353; Railroad Co. v. Cameron, 8 N. W. Rep. 99; Ry. Co. v. Peters, 8 N. W. Rep. 584; Nelson v. Ry. Co. 14 Minn. (Gil.) 360.

§ 679. **Presumption.** The killing or damaging of any horses, cattle, or other stock, by the cars or locomotives along said railroad or branches, shall be *prima facie* evidence of carelessness and negligence of said corporation.

§ 680. **Proceedings.** Whenever any horses, cattle, or stock may be killed or crippled by any train of cars or locomotives upon any railway within this territory, it shall be lawful for the owner of the horses, stock, or cattle so killed or crippled, after first giving a station agent of the corporation to which said railway shall belong, written notice of his intention to apply to a justice of the peace within the county in which said stock may have been killed or crippled, to appoint appraisers to affix a value upon the horses, cattle, or stock so killed or crippled; and said justice of the peace shall appoint three discreet and disinterested citizens of the county a board of appraisers, who, after having been duly sworn, shall examine the horses, cattle, or stock so killed or crippled, and affix a value upon the same if killed, or assess the damages to the same if crippled, and return to said justice of the peace a written report, describing the horses, cattle, or stock, stating whether they were killed or crippled, and also setting out the valuation or assessment of damage made by them; which report said justice shall preserve as a part of the records of his office.

§ 681. **Action if corporation fail.** In case the corporation shall fail, for the space of sixty days, to pay to the owner of the horses, cattle, or stock so killed or crippled, the full amount assessed by said board of appraisers, and one-half the costs attending the assessment, the owner shall have the right to institute an action, in any court in the county of competent jurisdiction, on the original cause of action; and if upon the trial of this action the owner recovers a verdict, it shall be the duty of the court to render judgment in the owner's favor for the amount of said verdict, and all costs incurred subsequent to the killing or crippling; but if the owner fails to recover a verdict, the costs of the action shall be taxed against him.

Sec. 678.

§ 682. **Fees.** The justice of the peace and the three appraisers shall receive, for their services under this act, each the sum of one dollar, to be paid equally by the railroad corporation, owner or owners of the horses, cattle, or stock killed or crippled.

PART III.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

CHAPTER XXXIV.

PRELIMINARY PROVISIONS.

§ 683. **Parties.** The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

Sec. 34.

§ 684. **Definitions.** A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a similar proceeding.

Secs. 509, 510.

WRIT OF CERTIORARI.

§ 685. **When and by whom granted.** A writ of *certiorari* may be granted by the supreme and district courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

Harst. Pr. 1068; sec. 712; People ex rel. Scrafford v. Sup'rs Gladwin Co. 2 N. W. Rep. 904; Stone v. Miller, 14 N. W. Rep. 781; Merrick v. Township Board of Arbela, 2 N. W. Rep. 922; State of Minnesota ex rel. v. Board of Public Works of City of St. Paul, 8 N. W. Rep. 161; Woodin v. Phœnix, 2 N. W. Rep. 923; Wilson v. Gifford, 4 N. W. Rep. 170; Bresler v. Ellis, 9 N. W. Rep. 439; Howall v. Shepard, 12 N. W. Rep. 661; Turner v. Village of Stanton, 4 N. W. Rep. 204; Corrie v. Corrie, Id. 213; State of Minnesota v. Probate Court, 10 N. W. Rep. 209; Parman v. School Inspectors, 12 N. W. Rep. 910; Healy v. Kneeland, 4 N. W. Rep. 586; Herrick v. Carpenter, 6 N. W. Rep. 574, 577; Gager v. Chippewa Sup'rs, 10 N. W. Rep. 186; Ishpeming v. Marony, 13 N. W. Rep. 527; Wilson v. Bartholomew, 7 N. W. Rep. 227; Smith v. Powell, Id. 602.

§ 686. **How commenced.** The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Harst. Pr. 1069; Knapp v. Gamsby, 11 N. W. Rep. 204; Ry. Co. v. Russ, Id. 289; Hobson v. People, Id. 771; Cunningham v. La Crosse & S. P. P. Co. 10 Minn. (Gil.) 235.

§ 687. **To whom writ directed.** The writ may be directed to the inferior court, tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified.

Harst. Pr. 1070.

§ 688. **Requisites of writ.** The writ of *certiorari* shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them, with convenient certainty, that the same may be reviewed by the court; and requiring the party in the mean time to desist from further proceedings in the matter to be reviewed.

Harst. Pr. 1071.

§ 689. **Stay of proceedings.** If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended, or the proceedings stayed.

Harst. Pr. 1072.

§ 690. **Service.** The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

Harst. Pr. 1073.

§ 691. **Extent of review.** The review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board, or officer has regularly pursued the authority of such court, tribunal, board, or officer.

Harst. Pr. 1074; McClatchie v. Durham, 7 N. W. Rep. 76; Ry. Co. v. Russ, 11 N. W. Rep. 289; State of Wisconsin v. Dodge County, 13 N. W. Rep. 680.

§ 692. **Return and hearing.** If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment either affirming or annulling or modifying the proceedings below.

Harst. Pr. 1075; Young v. Kelsey, 9 N. W. Rep. 453; Hobson v. People, 11 N. W. Rep. 691; Gervais v. Powers, 1 Minn. (Gil.) 30.

§ 693. **Judgment sent below.** A copy of the judgment, signed by the clerk, must be transmitted to the inferior court, tribunal, board, or officer having the custody of the record or proceedings certified up.

Harst. Pr. 1076.

§ 694. **Judgment roll.** A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitutes the judgment roll.

Harst. Pr. 1077.

WRIT OF MANDAMUS.

§ 695. **By and to whom issued.** The writ of *mandamus* may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person, to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Harst. Pr. 1085; sec. 712; Dakota v. Shearer, 8 N. W. Rep. 135; Nebraska v. Cunningham, 1 N. W. Rep. 1011; Minnesota v. Cox, 2 N. W. Rep. 494; Beecher v. County of Clay, Id. 1037; Ables v. County Sup'rs, 4 N. W. Rep. 206; Wisconsin v. Chamber of Commerce, 3 N. W. Rep. 760.

Does not lie. Bailey v. Ewart, 2 N. W. Rep. 1009; The People v. Brown, Id. 33; The People v. Fitzgerald, Id. 179; The People v. Judge, Id. 181; Ressler v. Hirsline, 3 N. W. Rep. 613; The People v. Judge, 1 N. W. Rep. 985; Nebraska v. Pearman, 4 N. W. Rep. 75; Wisconsin v. Clerk of Manitowoc Co. Id. 121; Burkle v. Judge, Id. 192; Douglas v. Circuit Judge, Id. 225; Nebraska v. Com'rs of Furnas Co. 6 N. W. Rep. 434; Robinson v. Sup'rs of Sheboygan, 13 N. W. Rep. 622; School-dist. No. 5 v. Circuit Judge, Id. 806; Lancaster Co. v. Nebraska, 14 N. W. Rep. 517.

§ 696. **When issued.** The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested.

Harst. Pr. 1086; sec. 712; Nebraska v. Thorne, 4 N. W. Rep. 63; Nebraska v. Co. Com'rs, 4 N. W. Rep. 258; Dakota v. Shearer, 8 N. W. Rep. 135; Goss v. Vermontville Common Council, 6 N. W. Rep. 684; Sherburn v. Horne, 7 N. W. Rep. 730.

§ 697. **Alternative or peremptory.** The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately upon the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done the command must be omitted, and a return-day inserted.

Harst. Pr. 1087.

§ 698. **When each may issue.** When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative writ must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

Harst. Pr. 1088.

§ 699. **Answer.** On the return of the alternative writ, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

Harst. Pr. 1089; sec. 701; State of Wisconsin v. Small, 12 N. W. Rep. 544; Nebraska v. Patterson, 9 N. W. Rep. 82; Olson v. Circuit Judge, 13 N. W. Rep. 369.

§ 700. **Jury may assess damages.** If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which allegation the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county or subdivision must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him.

Harst. Pr. 1090; Dakota v. Shearer, 8 N. W. Rep. 135.

§ 701. **Latitude of proof.** On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

Harst. Pr. 1091.

§ 702. **New trial.** The motion for new trial must be made in the court in which the issue of fact is made.

Harst. Pr. 1092; sec. 714.

§ 703. **Transmission of verdict.** If no notice of a motion for a new trial be given, or, if given, the motion be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict, attached to the order of trial, after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

Harst. Pr. 1093.

§ 704. **Hearing.** If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue only immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case.

Harst. Pr. 1094.

§ 705. **Damages—peremptory writ.** If judgment be given for the applicant, he may recover the damages which he sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs execution may issue; and a peremptory *mandamus* must also be awarded without delay.

Harst. Pr. 1095.

§ 706. **Service upon majority of board.** The writ must be served in the same manner as summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board was in session or not.

Harst. Pr. 1096.

§ 707. **Disobedience—punishment.** When a peremptory *mandamus* has been issued and directed to an inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

Harst. Pr. 1097.

WRIT OF PROHIBITION.

§ 708. **Definition of writ.** The writ of prohibition is the counterpart of the writ of *mandamus*. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

Harst. Pr. 1102; secs. 29, 712–714.

Home Ins. Co. v. Flint, 13 Minn. (Gil.) 228; Dayton v. Paine, Id. 454; State of Minnesota v. John D. Wilcox, 24 Minn. 143; State of Minnesota v. Probate Court of Ramsey Co. 19 Minn. (Gil.) 85; The People v. Judge of Superior Court of Detroit, 3 N. W. Rep. 850; State of Minnesota v. District Court, 2 N. W. Rep. 698; State of Minnesota v. Municipal Court of St. Paul, 2 N. W. Rep. 166.

§ 709. **By whom and when issued.** It may be issued by the supreme and district courts, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Harst. Pr. 1103.

Prignitz v. Fischer, 4 Minn. (Gil.) 275; State of Minnesota v. District Court of Ramsey Co. 2 N. W. Rep. 698; State of Minnesota v. Municipal Court of St. Paul, 2 N. W. Rep. 166; The People v. Judge of Superior Court of Detroit, 3 N. W. Rep. 850.

§ 710. **Alternative or peremptory.** The writ must be alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show why he should not be absolutely restrained, etc., must be omitted, and a return-day inserted.

Harst. Pr. 1105; Prignitz v. Fischer, 4 Minn. (Gil.) 275.

§ 711. **Proceedings.** The provisions for the proceeding under the writ of *mandamus*, except the first three sections thereof, apply to this proceeding.

MISCELLANEOUS PROVISIONS.

§ 712. **Supreme or district judges.** Writs of *certiorari*, *mandamus*, and prohibition may be issued by any two justices of the supreme court, or by a judge of the district court in vacation, and when issued by a judge of the district court may be made returnable, and a hearing thereon be had in vacation.

Harst. Pr. 165, 167, 1108; secs. 33-682; Territory of Dakota v. Shearer, 8 N. W. Rep. 135.

§ 713. **Rules of practice.** Except as otherwise provided in this chapter, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

Harst. Pr. 1109.

§ 714. **New trials and appeals.** The provisions of part two, relative to new trials and appeals, except in so far as they are inconsistent herewith, apply to the proceedings mentioned in this chapter.

Harst. Pr. 1110; sec. 702.
New trials. Secs. 285-290.
Appeals. Secs. 403-425.

CHAPTER XXXV.

OF SUMMARY PROCEEDINGS.

CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 715. **For what confessed.** A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

Wait, Code, 382; Harst. Pr. 1132.

§ 716. **Verified statement — contents.** A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed be for money due or to become due, it must state concisely the facts out of which the debt arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the amount of such liability.

Wait, Code, 383; Harst. Pr. 1133; Jarosh v. Easton, 10 N. W. Rep. 893; Grattan v. Matteson, 6 N. W. Rep. 298; Cleveland Co-operative Stove Co. v. Douglas, Id. 628; Wells v. Geiseke, 8 N. W. Rep. 380; Kendig v. Marble, 12 N. W. Rep. 584.

§ 717. **Proceedings in court—execution.** The statement must be presented to the district court or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk, whereupon it may be filed in the office of the clerk, who shall enter in the judgment-book a judgment for the amount confessed, with costs. The statement and affidavit, with the judgment, shall thenceforth become the judgment roll. Execution may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due, and whenever any further installments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

Wait, Code, 384; Harst. Pr. 1134; Grattan v. Matteson, 6 N. W. Rep. 298; Wells v. Geiseke, 8 N. W. Rep. 380.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ 718. **Requisites of the case.** Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action would be brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were pending.

Wait, Code, 372; Harst. Pr. 1138.

§ 719. **Judgment and roll.** Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

Wait, Code, 373; Harst. Pr. 1139.

§ 720. **When on civil judgment.** The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Wait, Code, 374; Harst. Pr. 1140.

RELIEF OF PERSONS CONFINED IN JAIL ON CIVIL PROCESS.

§ 721. **Discharge authorized.** Every person confined in jail on execution issued on judgment recovered in civil action, shall be discharged therefrom at the end of ten days from his first confinement therein, upon the conditions hereinafter specified.

Harst. Pr. 1143; sec. 311.

§ 722. **Notice of application.** Such person must cause notice in writing to be given to the plaintiff when and where he will apply to the judge of the district court in which the judgment was submitted, for the purpose of obtaining a discharge from his imprisonment.

Harst. Pr. 1144.

§ 723. **Service of notice.** Such notice must be served by delivering to and leaving with the plaintiff, his agent or attorney, a copy thereof, at least one day before the hearing of the application, when the plaintiff, his agent or attorney, served, live in the town or city where the application is to be heard, to which time of service one day must be added for every twenty miles, or fraction thereof, the plaintiff, his agent or attorney, served, shall reside distant from the place of hearing.

Harst. Pr. 1145.

§ 724. **Hearing.** At the time and place specified in the notice, such person must be taken, under the custody of the sheriff, before such district judge, and examined on oath concerning his property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such district judge shall also hear any other legal or pertinent evidence that may be produced by the debtor or creditor; and such examination must, at the election of the creditor, be reduced to writing, and subscribed and sworn to by the debtor and other witnesses.

Harst. Pr. 1146.

§ 725. **Oath by prisoner.** If, upon such examination, the judge before whom the same is had shall be satisfied that the prisoner is entitled to his discharge, he shall administer to him the following oath, to-wit:

I, ———, do solemnly swear [or affirm] that I have not any estate, real or personal, to the amount of ten dollars, except such as is by law exempt from levy and sale on execution, and that I have not any other estate, nor have I conveyed, concealed, or in any way disposed of any of my property, real or personal, with design to secure the same to my use, to hinder or delay or defraud my creditors. So help me God. [Signed, A. B.]

Harst. Pr. 1148.

§ 726. **Certificate of discharge.** After administering the oath, the judge must make a certificate under his hand as follows:

To the sheriff of the county ———: I do hereby certify that ———, confined in your jail upon an execution at the suit of ———, is entitled to be discharged from imprisonment, if he be imprisoned from no other cause.

Harst. Pr. 1149.

§ 727. **Forever exempt.** The jailer, upon receiving such certificate, must forthwith discharge the prisoner, if he be imprisoned from no other cause. The prisoner, after being so discharged, shall be forever exempt from arrest or imprisonment for the same debt, unless he shall have been convicted of having sworn falsely upon his examination, or in taking the oath herein prescribed.

Harst. Pr. 1149, 1151.

§ 728. **Judgment against estate.** The judgment against any prisoner who is discharged as herein provided for shall remain in full force against the estate which may then, or at any time after, belong to him. And the plaintiff may take out a new execution against the goods and estate of the debtor, in like manner and with like effect as if he had never been committed in execution.

Harst. Pr. 1152.

§ 729. **Prison costs.** If the debtor shall undertake to satisfy the execution he shall not be entitled to his discharge from imprisonment until he has paid all the charges for his commitment, and support in prison, in addition to the sum due on the execution, and the costs and charges thereon.

§ 730. **Discharge by plaintiff.** The prisoner may, at any time, be discharged upon the order of the plaintiff in the action, and when so discharged such debtor shall not thereafter be liable to imprisonment again for the same cause of action.

Harst. Pr. 1153.

§ 731. **Expenses advanced.** Whenever a debtor is committed to jail on a civil action, the creditor, or some one in his behalf, must advance to the sheriff or jailer sufficient money to pay for the support of such prisoner from time to time; and in case such creditor shall neglect or refuse to so advance the money for such prisoner's support, upon the sheriff's or jailer's demand, the jailer must, at the expiration of twenty-four hours after such demand, discharge such prisoner from custody; and such discharge shall have the same effect as a discharge by order of the creditor.

Harst. Pr. 1154.

§ 732. **Recommitment.** If, upon the examination, the prisoner shall not be discharged, he must be recommitted to jail under the execution, and shall not be again entitled to apply for his discharge from imprisonment, as herein provided, except upon the ground of newly-discovered evidence, or for other good cause shown to the district judge granting the application.

§ 733. **Appeals.** Either party may appeal to the supreme court from the order of the district judge granting or refusing a discharge from imprisonment, under these provisions in the same manner as from an order granting, refusing, continuing, or modifying a provisional remedy.

CHAPTER XXXVI.

CHANGE OF NAMES OF PERSONS AND PLACES.

§ 734. **District court power.** The district court shall have the authority to change the names of persons, towns, villages, and cities within this territory.

§ 735. **Petition—contents.** Any person desiring to change his or her name, may file a petition in the district court of the county or subdivision in which such person may be a resident, setting forth:

1. That the petitioner has been a *bona fide* citizen of such county

or subdivision for at least six months prior to the filing of the petition.

2. The cause for which the change of the petitioner's name is sought.

3. The name asked for.

And it shall be the duty of the judge of the district court, at any term thereof after the filing of such petition, upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that thirty days previous notice of the intended application has been given in some newspaper printed in such district, to order and direct a change of the name of such petitioner, and to direct that such order be entered by the clerk in the journal of the court.

Harst. Pr. 1276, 1277, 1278.

§ 736. **Town, village, or city.** Whenever it may be desirable to change the name of any town, village, or city, in any county of the territory, a petition for that purpose may in like manner be filed in the district court of the county or subdivision in which such town, village, or city is situated, setting forth the cause why such change of name is desirable, and the name asked to be substituted; and the court being satisfied by proof that the prayer of the petitioners is just, proper, and reasonable, and that notice, as in case of the change of names of persons, provided for in the preceding section, has been given, and that two-thirds of the legal voters of such town, village, or city desire such change of name, and that there is no other town, village, or city in the territory of the name asked for, may order and direct such change of name, and direct the clerk to enter such order upon the journal of the court.

§ 737. **Costs—limitation.** All proceedings under this chapter shall be at the cost of the petitioner or petitioners, and judgment may be entered against him or them for costs, as in other civil actions: *provided, always*, that any change of name under the provisions of this chapter shall in no manner affect or alter any action or legal proceedings then pending, or any right, title, or interest whatsoever.

CHAPTER XXXVII.

OF BASTARDS.

§ 738. **Complaint.** When any woman residing in any county in this territory is delivered of a bastard child, or is pregnant with a child which, if born alive, will be a bastard, a sworn complaint may be made in writing by any person to the district court of the county or judicial subdivision where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be entitled in the name of the people of the territory against the accused as defendant.

Sutfin v. People, 4 N. W. Rep. 509; Hamilton v. People, 9 N. W. Rep. 247.

§ 739. **Summons.** Upon the filing of the complaint the clerk shall issue a summons against the person so charged, which shall be served as in civil actions.

Secs. 97, 98, 103.

§ 740. **Lien upon realty.** From the time of the filing of such complaint a lien shall be created upon the real property of the accused in the county or judicial subdivision where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.

§ 741. **Attachment.** The judge of the district court may order an attachment to issue on such complaint without undertaking, which order shall specify the amount in value of property to be seized under the attachment, and may be revoked at any time by such judge or by the district court, on a showing made for the revocation of the same, and on such terms as may be deemed proper in the premises.

Ex parte Cottrell, 13 N. W. Rep. 174.

§ 742. **District attorney prosecutes..** The district attorney, on being notified of the facts justifying a complaint as contemplated in the first section of this subdivision, or of the filing of such complaint, shall prosecute the action on behalf of the complainant.

§ 743. **Issue—how tried.** The issue on the trial shall be "guilty," or "not guilty," and shall be tried as a civil action at law.

State of Iowa v. McGlothlen, 9 N. W. Rep. 893; State of Iowa v. Romaine, 11 N. W. Rep. 721; State of Minnesota v. Nichols, 13 N. W. Rep. 153; Doeling v. State of Wisconsin, 14 N. W. Rep. 593; State of Minnesota v. Worthingham, 23 Minn. 529; Cottrell v. State of Nebraska, 1 N. W. Rep. 1008; Baker v. State of Wisconsin, 2 N. W. Rep. 110.

§ 744. **Judgment.** If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner, as the court may direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be immediately paid, and afterwards, from time to time, as it shall be required and necessary to compel compliance with the order of the court.

Dingman v. State of Wisconsin, 4 N. W. Rep. 668; State of Minnesota v. Becht, 23 Minn. 1.

§ 745. **Modification of same.** The court may at any time enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated, on either party, and notice to the other.

§ 746. **County may prosecute.** In case any bastard becomes a county charge, for the support of which no proceedings have been instituted under the provisions of this subdivision, it shall be the duty of the board of county commissioners to proceed against the father of such bastard, if known, as herein directed.

CHAPTER XXXVIII.

HERD LAW.

§ 747. **Liability for trespass of animals.** Any person owning, or having in his or their charge or possession, any horses, mules, cattle, goats, sheep, or swine, or any such animals, which shall trespass upon the lands of another, or upon lands either fenced or not fenced, belonging to any person or persons other than the owner or owners of such animals, such person or persons owning, or having in charge or possession, such trespassing animal or animals, shall be liable to any party or parties sustaining such injury for all damages he, she, or they may have sustained by reason of such trespassing aforesaid, to be recovered in a civil action before any court having jurisdiction thereof, in the county where such damage may have occurred, and the proceedings shall be the same in all respects as in other civil actions, except as herein modified: *Provided,* that no property shall be exempt, except those exemptions made absolute from seizure and sale under executions issued upon judgment obtained under or by virtue of this chapter; and *provided, further,* that the party or parties claiming damages under the provisions of this chapter shall bring action in proper court to recover the same within sixty days after the infliction of such damages. (*As amended March 9, 1883.*)

§ 748. **Owner defined.** Any person occupying or cultivating lands shall be considered the owner thereof in any action under the provisions of the last section.

§ 749. **Notice of damages.** The parties sustaining damage done by animals as mentioned in section seven hundred and forty-seven, before commencing an action thereon, shall notify the owner or person having in charge such offending animal or animals, of such damage, the probable amount thereof: *provided,* he knows to whom such animal or animals belong.

§ 750. **Custody of animals.** The person suffering damage done by animals, as mentioned in section seven hundred and forty-seven, may retain and keep in custody such offending animals until the damage and costs are paid, or until good and sufficient security be given for the same; and whenever any animal or animals are restrained under this chapter, the person restraining the same shall forthwith notify the owner or person in whose custody the same was at the time the trespass was committed, of the seizure of said animals, providing the owner or person who had the same in charge is known to the person making said seizure.

§ 751. **Trial—lien upon animals.** Upon trial of an action under the provisions of section seven hundred and forty-seven of this chapter, the plaintiff shall prove the amount of damage sustained, and if he has retained and kept in custody the animals committing such damage, the amount of expense incurred for keeping the offending animals, and any judgment rendered for damages, costs, and expenses against the defendant shall be a lien upon the animals committing the damage, and they may be sold, and the proceeds applied to the satisfaction of the judgment, as in other cases of sale of personal property on execution; but if it shall appear upon the trial that no damage was sustained, judgment shall be rendered against the plaintiff for cost of suit, and damage sustained by defendant.

§ 752. **Unknown owner—service.** If upon trial it appears that the defendant is not the owner or person in charge of such offending animals, he shall be discharged, and the action and the suit may proceed as against a defendant whose name is unknown; and if, at the commencement of the action, the plaintiff does not know the name of the owner or keeper of such offending animals, he may bring suit against a defendant unknown. In such case service shall be made by publishing a copy of the summons, with a notice stating the nature of the action, in a weekly newspaper, if there be one published in the county; and if not, by posting copies of the summons and notice in three of the most public places within the county, in either case not less than ten days previous to the day of trial.

Sec. 144.

§ 753. **Overplus.** After judgment shall have been rendered against the defendant, unknown as aforesaid, the offending animals shall be sold, as in other civil actions; and after the said judgment and costs have been satisfied, if there is a surplus of money, it shall be placed in the hands of the county treasurer, and if the defendant does not appear and call for the same within six months from the day of sale, it shall be paid into the school fund for the use of the public schools of said county.

§ 754. **Justices' jurisdiction.** Justices of the peace shall have concurrent jurisdiction with the district court of all actions and proceedings under this chapter, when the damages claimed do not exceed one hundred dollars.

Approved February 17, 1877.

CHAPTER XXXIX.

MILL-DAMS AND MILLS.

An Act to Encourage the erection of Mill-Dams and Mills. [Chapter LI. Laws of 1862-3.]

§ 1. **Right stated.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* When any person may be desirous of erecting and maintaining a mill-dam upon his own land, across any water-course not navigable, and shall deem it necessary to raise the water by means of such dam, or occupy ground for mill-yard, so as to damage, by overflowing or otherwise, real estate not owned by him, nor damaged by consent, he may obtain the right to erect and maintain said dam, by proceeding as in this act provided.

§ 2. **Petition—contents.** He shall present to the judge of any court of record in which jury trials are had in the county, or, if there be no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition setting forth the place, as near as may be, where said dam is to be located, the height to which it will be raised, the purposes to which the water-power will be applied, and such other facts as may be necessary to show the objects of the petition.

§ 3. **Commissioners appointed.** Upon the presentation of such petition, the judge shall appoint three disinterested residents of the county, in which said dam or a part of it is to be erected, commissioners to meet at the place of its proposed erection, on a day specified by such judge, and to inquire touching the matters contained in said petition, and the judge shall fix the fees of said commissioners.

§ 4. **Oath.** Before entering upon their duties, the commissioners shall severally take and subscribe an oath, before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment.

§ 5. **Notice of meeting.** At the request of the petitioner, the commissioners shall give, or cause to be given, notice of the time, place, and object of their meeting to every person named by said petitioner.

§ 6. **Time and manner of notice.** At least five days' notice shall be given in all cases, and in cases of infants such notice shall be served on their guardians, or on persons with whom they reside; in cases of idiots, lunatics, or distracted persons, on their guardians, if they have any, and if not, then on the person under whose case or charge they may be found; in cases of *femes covert* on the husband as well as the *feme covert;* but notices to non-residents of the county or counties where said dam or part of it is to be located, shall be published in some newspaper in the county aforesaid, or the one nearest thereto, for three weeks in succession, previous to the meeting of said commissioners.

§ 7. **Examination and assesssment.** The commissioners shall meet at the time and place specified in the notice, and shall proceed to examine the point at which said dam is proposed to be erected, and the lands and real estate above and below, which will probably be injured by the erection of said dam; shall hear the allegations and testimony of all parties interested; and shall proceed to make a separate assessment of damages which will result to any person by the erection of said mill-dam and its maintenance forever.

§ 8. **Report.** Within thirty days after completing their examination, the commissioners shall file the petition, their appointment, jurats, (oaths,) and a report of their proceedings, in the office of the clerk of the court in the first section of this act mentioned, and shall give notice of the filing of said report as of their meeting.

§ 9. **Damages—how paid.** Upon the filing of said report the petitioners may make payment of the damages assessed to the parties entitled to the same in the manner following, to-wit:

1. To parties laboring under no disability.
2. To guardians of infants, husbands or trustees of *femes covert.*
3. To guardians or conservators of insane persons.

And receipts for such payment, filed in the office of the clerk aforesaid, shall stop the parties receipting from all further claim or proceeding in the premises. Payments to parties residing in the territory, but not in the county or counties where said dam or part of it is to be erected, as well as to the infants who have no guardian, and insane persons who have no guardians or conservators, and payments to parties residing out of the territory, and to persons whose names are unknown, and to persons who shall refuse to receive the payments when tendered, shall be made by depositing the money with the treasurer of the county or counties aforesaid, who shall pay out the same upon the order of the commissioners or court, take receipts for all payments, and file the same with the order, in the office of the clerk of the court aforesaid, and such deposit shall have the same effect as the first-mentioned receipts, unless an appeal is taken by the party entitled thereto.

§ 10. **Appeals—by whom.** Appeals from the assessments made by the commissioners may be taken and prosecuted in the court aforesaid, by any party interested (the petitioner excepted) not under legal disability, by husbands or trustees of *femes covert*, guardians of infants, guardians or trustees of insane persons; and in cases where infants or insane persons have no guardians or conservators, appeals may be taken by the friend of such parties, and a written notice of such appeal be served upon the appellee, as a summons in ordinary civil actions: *provided*, that no appeal shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

§ 11. **Bond by petitioner.** The erection of said dam shall not be hindered, delayed, or prevented by the prosecution of any appeal: *provided*, the petitioner shall execute and file with the clerk of the court in which the appeal is pending, a bond, to be approved by said clerk, with surety or sureties, conditioned that the person executing the same shall pay whatever amount is required by the judgment of the court, and abide any rule or order of the court in relation to the matter in controversy.

§ 12. **Bond by appellant.** The appellant shall file with the clerk aforesaid a bond, with security, to be approved by said clerk, in double the amount of the assessment appealed from, payable to the people of the territory, for the use of all persons interested, in the condition in which bond the proceeding appealed from shall be recited, with condition for the due and speedy prosecution of the appeal, and that he or they will satisfy the judgment that may be rendered in the premises, and pay the costs of the appeal, if adjudged to do so by the court, in reference to the matter in controversy.

§ 13. **Trial of appeal.** Appeal shall bring before the court the propriety of the amount of damages reported by the commissioners in respect to the parties to the appeal, and, unless the parties otherwise agree, the matter shall be submitted to and tried by a jury as other appeal cases, and the court or jury, as the case may be, shall assess the damages aforesaid, making the verdict conform to the question and facts in the case.

§ 14. **Actual damage only.** No exemplary or vindictive damages shall be allowed by the commissioners, court, or jury.

§ 15. **Judgment.** Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered, declaring that upon payment of the damages assessed by the court or jury, as the case may be, and costs, if any, the right to erect and maintain the mill-dam aforesaid, according to the petition, shall, as against the parties interested in such verdict, be and remain in the petitioner, his heirs and assigns, forever, subject to be lost as hereinafter provided, and payments of such judgments made as payments of assessments, by the commissioners, as hereinbefore provided.

§ 16. **Other improved powers.** No mill-dam shall be erected or maintained under the provisions of this act to the injury of any water-power previously improved.

§ 17. **Limitations of actions.** No action for damages, occasioned by the erection and maintenance of a mill-dam, shall be hereafter sustained unless such action be brought within two years after the erection of said dam: *Provided,* that such limitation shall not run against or apply to persons living on and holding government land under the pre-emption laws, until a patent for the land damaged or overflown shall have been issued.

§ 18. **Dams previously built.** Any person may obtain a right to maintain or raise a dam heretofore erected upon his own land, across any water-course not navigable, by complying with the provisions of this act, adapting his petition to the nature of the case.

§ 19. **Proceedings suspend suits.** Upon the evidence of the commencement of proceedings, as provided in the second and eighteenth sections of this act, the court before which any suit for damages occasioned by such mill-dam, shall be instituted after the commencement aforesaid, shall have power to suspend any such suit until the result of such proceedings shall be known.

§ 20. **Petitioner pays costs.** The costs of all proceedings under this act, except such as arise or grow out of appeals, shall be paid by the petitioner, and costs of appeal shall be paid as the court may direct.

§ 21. **Entry authorized.** For the purpose of making surveys and examinations relating to any proceedings under the provisions of this act, it shall be lawful to enter upon any land, doing no unnecessary injury.

§ 22. **Loss of right.** Any person having obtained right to erect and maintain, or to maintain or raise, any dam, under the provisions of this chapter, who shall not within one year thereafter begin to build, if he has not previously built, said dam, and finish the same, and apply the water-power thereby created to the purposes stated in his petition, within three years; or in case the said dam and mills connected therewith shall be destroyed, shall not begin to rebuild in one year after such destruction, and finish in three years; or having erected such mills shall fail to keep them in operation for one year at any one time, shall forfeit all rights acquired by virtue of the provisions of this act, unless at the time of such destruction the owner be an infant, or otherwise disabled in law, in which case the same time shall be allowed after the removal of such disability: *provided, however,* where the water, backed up by any dam belonging to any mill-owner or machinery, is about to break through or over the banks of the stream or race, or to wash a channel so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he does not own such banks, or the lands lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as shall be necessary to prevent such water from breaking through or over the banks of such stream or race, or washing a channel, as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay any damages which the owner of the land may actually sustain by the erection and repair aforesaid: *and provided further,* that if any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason of such injury, destruction, or removal. (*As amended, Sess. Laws 1881, c. 95.*)

Approved January 7, 1863.

Amended chapter 95 of Acts of 1881, p. 122; Seely v. Bridges, 14 N. W. Rep. 524; Towner v. Holleran, 11 Minn. (Gil.) 168; Faribault v. Hulett, 10 Minn. (Gil.) 15; Thornton v. Turner, 11 Minn. (Gil.) 237.

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PROBATE CODE.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

TITLE I.

PROCEEDINGS IN PROBATE COURT.

CHAPTER I.

JURISDICTION.

§ 1. **Jurisdiction and powers.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* That the probate court has jurisdiction, and the judge thereof power, which must be exercised in the cases and in the manner prescribed by statute:

1. To open and receive proof of last wills and testaments, and to admit them to proof, and to revoke the probate thereof, and to allow and record foreign wills.
2. To grant letters testamentary, of administration, and of guardianship, and to revoke the same.
3. To appoint appraisers of estates of deceased persons.
4. To compel executors, administrators, and guardians to render accounts.
5. To order the sale of property of estates, or belonging to minors.
6. To order the payment of debts due from estates.
7. To order and regulate all distributions of property or estates of deceased persons.
8. To compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate, or of a minor.
9. To exercise all the powers conferred by this chapter or by other law.

10. To make such orders as may be necessary to the exercise of the powers conferred upon it.

11. To appoint and remove guardians for infants, and for persons insane or otherwise incompetent; to compel payment and delivery by them of money or property belonging to their wards; to control their conduct and settle their accounts.

Secs. 17, 390, 6; Davis v. Hudson, 11 N. W. Rep. 136; Loosemore v. Smith, Id. 493; Bates v. Dunham, 12 N. W. Rep. 309; Jacobs v. Fouse, 23 Minn. 51; State of Minnesota v. Wilcox, 24 Minn. 143.

§ 2. **Construction and effect of proceedings.** The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments, and decrees there are accorded like force, effect, and legal presumptions as to the records, orders, judgments, and decrees of district courts.

Dayton v. Mintzer, 22 Minn. 393; Moreland v. Lawrence, 23 Minn. 85.

§ 3. **Service of process.** All process issued by the probate court shall be served in the same manner, and by the persons and officers, as provided for the service of process of the district court, with the same fees.

Code Civil Proc. Dak. 102, 103, 104; sec. 303.

§ 4. **When judge disqualified.** When the judge of the probate court is a party to any proceeding therein, or connected by blood or affinity to any person so interested nearer than the fourth degree, or is personally interested in the conduct or event of any probate matter or proceeding, or when he is named as a legatee or devisee, or executor, or trustee in a will, or is a witness thereto, he shall be disqualified to act therein, and it shall be disposed of as follows:

1. He shall call the county clerk, who shall in such cases be substituted for, and have power to act in place of, the judge of the probate court; and such acts of the county clerk, while acting as judge of the probate court, shall be binding upon all parties interested therein, and the record shall set forth the occasion of his substitution, and show by his official signature the proceedings had, and the acts done by and before him.

2. Whenever, in such cases, the probate of any will, the appointment of any executor, administrator, or guardian, or any other probate act, is resisted, and any issue of law or fact is joined, the said issue, and all the papers and records relating thereto, shall be sent to the district court for the county or judicial subdivision which shall have full jurisdiction of the same, and it shall be tried and determined, and the necessary judgment and order made, by that court; and all the proceedings had, and the judgments and orders made therein, shall be entered by the clerk of said court in the record of the probate court, and returned, together with all the papers, to the

probate court; and the clerk of the district court is entitled to charge and receive the same fees as for like services in the district court, and the county clerk the same fees as the judge of the probate court in like cases.

Secs. 5, 143.

§ 5. **Jurisdiction resumed.** Under the substitution or transfer of jurisdiction provided in the last section, the law and the rights of parties shall in all other respects be and remain the same; and if, before the issues so transferred are decided, or the administration of such estate is closed, another person be elected or appointed and qualified as judge of the probate court, who is not disqualified to act in the settlement of the estate, he must resume full jurisdiction of the case, and upon notice to that effect from the judge of the probate court, the clerk of the district court must return all papers and records to the probate court.

§ 6. **Judge's powers.** A judge of the probate court, as contradistinguished from the probate court, may exercise out of court all the powers expressly conferred upon him as a judge.

Secs. 17, 390, 93.

§ 7. **Venue of probate acts.** Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.
2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the territory.
3. In the county in which any part of the estate may be, the decedent having died out of the territory, and not resident thereof at the time of his death.
4. In the county in which any part of the estate may be, the decedent not being a resident of the territory, but dying within it, and not leaving estate in the county in which he died.
5. In all other cases, in the county where application for letters is first made.

Secs. 8, 9.

§ 8. **In either county.** When the estate of the decedent is in more than one county, he having died out of the territory, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the territory, and not leaving estate in the county where he died, the probate court of that county, in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

Secs. 7, 9.

§ 9. **Territorial exclusive jurisdiction.** The probate court of the county in which application is first made for letters testamentary or of administration in any of the cases above mentioned, shall have jurisdiction co-extensive with the territory in the settlement of the estate of the decedent and the sale and distribution of his real estate, and excludes the jurisdiction of the probate court of every other county.

Secs. 7, 8.

CHAPTER II.

PROBATE OF WILLS.

ARTICLE I.—PETITION, NOTICE, AND PROOF.

§ 10. **Custodian must deliver.** Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

Probate of wills. Petition for. Secs. 11, 12. Notices. Secs. 15, 16, 18. Hearing. Sec. 15. Of foreign will. Secs. 28 to 30. Of lost or destroyed will. Secs. 38 to 41. Of nuncupative will. Secs. 42 to 44. When conclusive. Sec. 37. Certificate of. Secs. 26, 30, 27.

§ 11. **Who may petition.** Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the territory, or a nuncupative will.

§ 12. **Requisites of petition.** A petition for the probate of a will must show:

1. The jurisdictional facts.
2. Whether the person named as executor consents to act, or renounces his right to the letters testamentary.
3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known to the petitioner.
4. The probable value and character of the property of the estate.
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

Hathaway's Appeal, 9 N. W. Rep. 435.

§ 13. **Presumed renunciation.** If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

§ 14. **Compulsory production of will.** If it be alleged in any petition that any will is in the possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it in the court at the time named in the order. If he has possession of the will, and neglects or refuses to produce it in obedience to the order, he may, by warrant of the court, be committed to the jail of the county, and kept in close confinement until he produces it.

§ 15. **Hearing—notice.** When the petition is filed and the will produced, the judge of the probate court must fix a day for hearing the petition, not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by the judge by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice be published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last days being included. If the notice is by posting, it must be given at least ten days before the hearing.

Secs. 16, 18, 308, 311, 43; Richards v. Pierce, 7 N. W. Rep. 54.

§ 16. **Heirs noticed by mail.** Written or printed copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the territory, at their places of residence, if known to the petitioner, and deposited in the post-office, with the postage thereon prepaid by the petitioner, at least ten days before the hearing. The notice must be issued by the judge over the seal of the court. Proof of the mailing of the notice must be made at the hearing; the same notice and proof of service thereof on the person named as executor must be made if he be not the petitioner; also on any person named as co-executor, not petitioning, if their place of residence be known.

Secs. 15, 18, 29. In re Application to Probate Will of Mousseau, 14 N. W. Rep. 887.

§ 17. **Powers at chambers.** The judge of the probate court may, out of term time, or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills, and the attendance of witnesses, and may appoint special terms of his court for hearing the petitions, trials of issues, and admitting wills to probate.

Secs. 6, 390, 93.

§ 18. **Proof of notice—waiver.** At the time appointed for the hearing, or at the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. If such notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof, as original notice is required to be given. The appearance in court of parties interested is a waiver of notice.

Secs. 67, 16, 66.

§ 19. **Contestants.** Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves, or by the court, for that purpose; but a contest made by an attorney appointed by the court, does not bar a contest, after probate, by the party so represented, if commenced within one year after such probate; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will.

Secs. 22, 206, 308, 311; Hathaway's Appeal, 9 N. W. Rep. 435.

§ 20. **Requisites when no contest.** If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Hathaway's Appeal, 9 N. W. Rep. 435; In re Application to Probate Will of Mousseau, 14 N. W. Rep. 887.

§ 21. **Olographic—how proved.** An olographic will may be proved in the same manner that other private writings are proved.

ARTICLE II.—CONTESTING PROBATE OF WILLS.

§ 22. **Proceedings—issues—trial.** If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer allowed by law in civil actions. If the demurrer be sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner, and others interested, may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will;

—Must be tried and determined by the court. On the trial the contestant is plaintiff, and the petitioner is defendant.

Sec. 307. Contest of Probate of Wills. Secs. 22–27. Contest of will after probate. Secs. 31–37. Contest of will--who may contest. Sec. 19. Contest, how tried. Secs. 307, 308; Webber v. Sullivan, 12 N. W. Rep. 319.

§ 23. **Findings and conclusions—record.** The court, after hearing the case, must give in writing the findings of fact and conclusions of law upon the issues submitted, and upon these the court must render judgment, either admitting the bill to probate, or rejecting it. In either case, the proofs of subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will, and proofs must be recorded.

Sec. 307.

§ 24. **Witnesses on contest.** If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county, and are not present at the time appointed for proving the will, the court may admit the testimony of other witnesses, to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

§ 25. **Testimony preserved.** The testimony of each witness, reduced to writing and signed by him, shall be taken, kept, and filed by the judge, and shall be good evidence in any subsequent contests or trials, concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this territory.

Secs. 27, 38.

§ 26. **Certificate of probate.** If the court be satisfied upon the proof taken that the will was duly executed, and that the testator was, at the time of the execution thereof, of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts so found, signed by the judge, and attested by the seal of the court, must be attached to the will.

Secs. 40, 30.

§ 27. **Record of same.** The will and the certificate of the proof thereof, together with all the evidence taken, must be filed by the judge, and recorded by him in a book to be provided, at the charge of the county, for that purpose.

Sec. 40.

ARTICLE III.—PROBATE OF FOREIGN WILLS.

§ 28. **Where estate claimed.** Every will duly proved and allowed in any other of the territories, or in any of the United States, or the District of Columbia, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate, or any estate for which claim is made.

Pott v. Pennington, 16 Minn. (Gil.) 460.

§ 29. **Petition.** When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing, notice whereof must be given as provided for an original petition for the probate of a will.

Sec. 12. Agent to receive service. Sess. Laws 1883, c. 106.

§ 30. **Requisites of proof.** If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the territories, or any state of the United States, the District of Columbia, or in any foreign country or state, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this territory, it must be admitted to probate, be certified in like manner according to the facts, and recorded, and have the same force and effect as a will first admitted to probate in this territory, and letters testamentary or of administration issued thereon.

ARTICLE IV.—CONTESTING WILL AFTER PROBATE.

§ 31. **Causes—limitations.** When a will has been admitted to probate, any person interested therein may, at any time within one year after such probate, contest the same, or the validity of the will. For that purpose he must file in the court in which the will was proved a sworn petition in writing, containing his allegations that evidence discovered since the probate of the will, the material facts of which must be set forth, show:

1. That a will of a later date than the one proved by the decedent, revoking or changing the former will, has been discovered, and is offered; or,

2. That some jurisdictional fact was wanting in the former probate; or,

3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or,

4. That the former will was not duly executed and attested.

Sec. 22.

§ 32. **Citation, to whom.** Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators, with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the territory, so far as known to the petitioner, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

Secs. 72, 85, 302, 303, 304. Agent to receive service. Sess. Laws 1883, c. 106.

§ 33. **Other will—notice.** If another will be offered by the petition, it must show all that is required in the original case of a petition for the probate of a will, and like notices must be served in the same manner, and upon all the parties as required before the hearing of proof of any will originally: *provided,* that such notices need not be served on any persons upon whom the citation required in the preceding section is to be served.

Sec. 12, 15, 16.

§ 34. **Hearing proofs.** At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon the persons named therein, and the required publication, posting, and service of the notices having been made, and all duly proved, the court must proceed to try the issues joined in the same manner as in an original contest of a will. If, upon hearing the proofs of the parties, the court shall decide that the will is, for any of the reasons alleged, invalid, or that it is not proved to be the last will of the testator, the probate must be annulled and revoked; and if the court shall decide that the new will is valid, it may admit the same to probate in the same manner as originally upon the probate of a contested will.

Secs. 302, 303, 304, 22, 307, 308.

§ 35. **Effect of revocation.** Upon the revocation being made, the powers of the executor or administrator, with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Sec. 307.

§ 36. **Costs.** The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate be confirmed. If the probate be annulled and revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

§ 37. **Probate, when conclusive.** If no person, within one year after the probate of a will, contests the same or the validity thereof, the probate of the will is conclusive, saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed.

Secs. 388, 207, 387.

ARTICLE V.—PROBATE OF LOST OR DESTROYED WILL.

§ 38. **Proceedings.** Whenever any will is lost or destroyed, the probate court must take proof of the execution and validity thereof, and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, signed by the witnesses, filed and preserved.

Secs. 15, 16, 125, 126.

§ 39. **Special requisites.** No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the life-time of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

§ 40. **Statement of will.** When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge of the probate court, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary, or of administration with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in article two of chapter two.

Sec. 26.

§ 41. **Restraint of other acts.** If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

ARTICLE VI.—PROBATE OF NUNCUPATIVE WILLS.

§ 42. **Special additional facts.** Nuncupative wills may, at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of wills executed in writing. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

§ 43. **Limitation of time and fact.** The probate court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of fourteen days from the death of the testator, nor must such petition be at any time acted on, unless the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons, resident in the territory or county, interested in the estate, are notified, as provided in article one of chapter two.

§ 44. **Double time for revocation.** Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills: *provided,* that double the period allowed for the petition of revocation of the probate of a written will shall be allowed in which to petition for the revocation and annulling of a nuncupative will.

CHAPTER III.

EXECUTORS AND ADMINISTRATORS—THEIR LETTERS, BONDS, REMOVALS, AND SUSPENSIONS.

ARTICLE I.—LETTERS TESTAMENTARY, AND OF ADMINISTRATION WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

§ 45. **Executors by the will.** The court admitting the will to probate after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who must appear and qualify, unless objection be made as provided in the second section following.

§ 46. **Incompetency defined.** No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust, by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued.

Secs. 103, 51.

§ 47. **Objections to executors.** Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration, with the will annexed.

§ 48. **Woman's marriage annuls.** When an unmarried woman, appointed executrix, marries, her authority is extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as a *feme sole.*

§ 49. **Executor's death.** No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

§ 50. **Disqualification removed.** Where a person absent from the territory, or a minor, is named executor, and there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor, or the arrival of the minor at the age of majority.

§ 51. **Appointment or act of part.** When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; when there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the territory, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing to act for both; and when there are more than two executors or administrators, the act of a majority of them is valid.

Sec. 103.

§ 52. **Administrators same power.** Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the judge of the probate court, and bear the seal thereof.

Secs. 50, 104.

ARTICLE II.—FORM OF LETTERS.

§ 53. **Testamentary.** Letters testamentary must be substantially in the following form.

TERRITORY OF DAKOTA, }
COUNTY OF ———. }

The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ———, C. D., who is named therein, is hereby appointed executor.

Witness, G. H., judge of the probate court of the county of ———, with the seal of the court affixed, the ——— day of ———, A. D. 18—.

[Seal, and the official signature of the judge.]

§ 54. **Of administration with will.** Letters of administration with the will annexed must be substantially in the following form:

TERRITORY OF DAKOTA, }
COUNTY OF ———. }

The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ———, and there being no executor named in the will, [or, as the case may be,] C. D. is hereby appointed administrator, with the will annexed.

Witness G. H., judge of the probate court of the county of ———, with the seal of the court affixed, the ——— day of ———, A. D. 18—.

[Seal, and the official signature of the judge.]

§ 55. **Of administration.** Letters of administration must be signed by the judge, under the seal of the court, and substantially in the following form.

TERRITORY OF DAKOTA, }
COUNTY OF ———. }

C. D. is hereby appointed administrator of the estate of A. B., deceased.

Witness G. H., judge of the probate court of the county of ———, with the seal thereof affixed, the ——— day of ———, A. D. 18—.

[Seal, and official signature of the judge.

Letters of administration.

Form of. Secs. 54, 55.
With will annexed. Secs. 50, 52, 54, 104.
To whom, and the order of preference. Secs. 56–61.
Petition for and contest. Secs. 62–70.
Revocation of, in favor of preferred applicant. Secs. 71–74.
" " will subsequently found. Sec. 101.
" " for failure to furnish additional bond. Sec. 92.
" " for disobedience to orders of court. Sec. 87.
" " for failure to return account of sales. Sec. 208.
" " in case of resignation. Sec. 105.
" " neglect to file inventory. Sec. 120.
" " for embezzlement. Secs. 108–112.
" " for neglect to notify creditors. Sec. 159.
" " for absconding or concealing himself. Sec. 247.
Peck v. Strong, 3 N. W. Rep. 697.

ARTICLE III.—LETTERS OF ADMINISTRATION—TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

§ 56. **Who entitled—order.** Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The creditors.
9. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving parter must in no case be appointed administrator of his estate.

§ 57. **Preferences required.** Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole blood to those of the half blood.

§ 58. **Equally entitled.** When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.

§ 59. **To guardian or minor.** If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.

§ 60. **Incompetency defined.** No person is competent to serve as administrator or administratrix who, when appointed, is:

1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

§ 61. **Women.** A married woman must not be appointed administratrix. When an unmarried woman, appointed administratrix, marries, her authority is extinguished.

ARTICLE IV.—PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

§ 62. **Requisites of petition.** Petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the judge of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

Shipman v. Butterfield, 11 N. W. Rep. 283.

§ 63. **When granted.** Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.

§ 64. **Notice of hearing.** When a petition praying for letters of administration is filed, the judge must give notice thereof containing the name of the decedent, the name of the applicant for letters, and the day and term of the court at which the application will be heard, which notice must be published by posting, or printing in a newspaper, the same as required for notice of the probate of a will.

Secs. 66, 67, 72.

§ 65. **Who may contest—grounds.** Any person interested may contest the petition by filing written opposition thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together.

§ 66. **Hearing.** On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Secs. 64, 67, 308.

§ 67. **Proof of notice.** An entry in the minutes of the court that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

Secs. 64, 66.

§ 68. **Waiver of better right.** Letter of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

§ 69. **Proof of intestacy, property, etc.** Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

§ 70. **Other appointees—non-residents.** Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the territory, affidavits or depositions taken *ex parte* before any officer authorized by the laws of this territory to take acknowledgments and administer oaths out of this territory, may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

ARTICLE V.—REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

§ 71. **When allowed.** When letters of administration have been granted to any person other than the surviving husband, or wife, child, father, mother, brother, or sister, of the intestate, any one of them may obtain the revocation of the letters, and be entitled to the administration, by presenting to the probate court a petition praying the revocation, and that letters of administration may be issued to him.

Sec. 55.

§ 72. **Additional notice.** When such petition is filed, the judge must, in addition to the notice provided upon petition for letters, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

Secs. 302, 303, 304, 305; White v. Spaulding, 14 N. W. Rep. 684.

§ 73. **Hearing.** At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

§ 74. **Prior rights asserted.** The surviving husband or wife, when letters of administration have been granted to a child, father, mother, brother, or sister, of the intestate, or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

Sec. 56.

ARTICLE VI.—OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

§ 75. **Oath—record.** Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the judge in books to be kept by him in his office for that purpose.

In re Will of Cole, 9 N. W. Rep. 664.

§ 76. **Bond—form—penalty.** Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the territory of Dakota, with two or more sufficient sureties, to be approved by the judge of the probate court. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property and twice the probable value of the annual rents, profits, and issues of the real property belonging to the estate, which values, must be ascertained by the probate judge, by examining on oath the party applying, and any other persons.

Bond. Condition of. Sec. 78. Separate for several administrators. Sec. 79. Liability on. Sec. 80. Justification of sureties on. Secs. 81, 82. Additional. Sec. 77. Becoming insufficient. Secs. 84, 86. To be filed and recorded. Sec. 75. Of special administrator. Sec. 97. Of administrator subsequently appointed. Sec. 104. Stands in place of appeal bond. Sec. 331. Who may sue on. Sec. 80. By agent of absentees. Secs. 292, 295.

Buel v. Dickey, 2 N. W. Rep. 884; Carpenter v. Judge of Probate, 12 N. W. Rep. 197; Detroit Savings Bank v. Zeigler, 13 N. W. Rep. 496; Wood v. Myrick, 17 Minn. (Gil.) 386; Lanier v. Irvine, 21 Minn. 447; S. C. 24 Minn. 116.

§ 77. **Additional bond.** The judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into the possession of, the executor or administrator, including the annual rents, profits, and issues of real estate still belonging to the estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

§ 78. **Condition of bond.** The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Williams v. Williams, 12 N. W. Rep. 465; Dakota v. Bramble, 5 N. W. Rep. 945; Schwickerath v. Lochen, 4 N. W. Rep. 805.

§ 79. **Separate bonds.** When two or more persons are appointed executors or administrators, the judge of the probate court must require and take a separate bond from each of them.

§ 80. **Successive recoveries.** The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Williams v. Williams, 12 N. W. Rep. 465; Johannes v. Youngs, 4 N. W. Rep. 32; Palmer v. Pollock, Id. 1113; Dakota v. Bramble, 5 N. W. Rep. 945.

§ 81. **Justification—approval—record.** In all cases where bonds are required to be given under this title, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the territory, and are each worth the sum specified in the bond over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the bond exceeds one thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the bond, if the whole amount be equivalent to that of two sufficient sureties, and the affidavits thereof must be attached to, and filed and recorded with, the bond. All such bonds must be approved by the judge of the probate court before being filed and recorded.

Before the judge of the probate court approves any bond required under its title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, issue a citation, requiring such sureties to appear before him, at a designated time and place, to be examined touching their property and its value; and the judge must at the same time issue a notice to the executor or administrator, requiring his appearance on the return of the citation; and on its return he may examine the sureties, and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.

Carpenter v. Judge of Probate, 12 N. W. Rep. 197.

§ 82. **Examination of sureties.** If sufficient security be not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

§ 83. **Bond waived by will.** When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may, at any time afterwards, if it appears from any cause necessary or proper, be required to file a bond as in other cases.

§ 84. **Bond becoming insufficient.** Any person interested in an estate may, by verified petition, represent to the judge of the probate court that the sureties of the executor or administrator thereof have become or are becoming insolvent, or that they have removed or are about to remove from this territory, or that from any other cause the bond is insufficient, and ask that further security be required.

§ 85. **Service of citation.** If the judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return-day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence, or by such publication as the judge may order.

Secs. 302, 303, 304, 305.

§ 86. **Hearing and order.** On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form within a reasonable time, not less than five days.

Sec. 93.

§ 87. **Revocation for disobedience.** If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

Sec. 55.

§ 88. **Suspension of powers.** When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where by the terms of the will no bond was originally required, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Secs. 108, 109.

§ 89. **Judge must inquire.** When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the judge of the probate court, without any application, must cite him to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

§ 90. **Release of surety.** When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application by petition to the judge of the probate court for relief. The judge must issue a citation to the executor or administrator, to be served personally upon him, requiring him to appear at a time and place to be therein specified, and give other security. If he has absconded, left, or removed from the territory, or cannot be found after due diligence and inquiry, service may be made as provided when the citation is to require further security.

§ 91. **When allowed.** If new sureties be given to the satisfaction of the judge, he may thereupon make and enter an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

§ 92. **Revocation.** If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the judge must, by order, revoke his letters.

Sec. 55.

§ 93. **Hearings out of term.** The applications authorized by the nine preceding sections of this chapter may be heard and determined out of term time; and all orders made therein must be entered upon the minutes of the court.

Secs. 6, 17, 390.

ARTICLE VII.—SPECIAL ADMINISTRATORS, THEIR POWERS AND DUTIES.

§ 94. **When may be appointed.** When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies, or is suspended or removed, the judge of the probate court must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

§ 95. **How appointed.** The appointment may be made out of term time, and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the judge must issue letters of administration to such person in conformity with the order in the minutes.

§ 96. **Preference.** In making the appointment of a special administrator, the judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

§ 97. **Bond.** Before any letters issue to any special administrator, he must give bond in such sum as the judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters.

§ 98. **Duties of special administrator.** The special administrator must collect and preserve, for the executor or administrator, all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues, and profits, claims and demands, of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate; and for such and all necessary purposes may commence and maintain, or defend, suits and other legal proceedings, as an administrator; he may sell such perishable property as the probate court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

Masterson v. Brown, 1 N. W. Rep. 791; Cadman v. Richards, 14 N. W. Rep. 159.

§ 99. **Superseded.** When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

§ 100. **Account.** The special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do.

Secs. 232 to 257.

ARTICLE VIII.—WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

§ 101. **Administration revoked.** If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

§ 102. **Succession to duties.** In such case, the executor or administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Sec. 211; Schwickerath v. Lochen, 4 N. W. Rep. 805.

§ 103. **One remaining completes duty.** In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

Sec. 51.

§ 104. **Successor appointed.** If all such executors or administrators die or become incapable, or the power and authority of all of them are revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow, or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

Secs. 56–61.

§ 105. **Resignation—liability.** Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate of the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation.

Sec. 247; Rumrill v. Bank of St. Albans, 9 N. W. Rep. 731.

§ 106. **Previous acts valid.** All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

§ 107. **Proof of appointment.** A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the judge, under his hand and the seal of his court, that such person has given bond and qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

Moreland v. Lawrence, 23 Minn. 85.

ARTICLE IX.—REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

§ 108. **Embezzlement.** Whenever the judge of the probate court has reason to believe, from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the territory, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order, entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

Secs. 109–112, 87, 88, 120, 121; White v. Spaulding, 14 N. W. Rep. 684.

§ 109. **Suspension — citation.** When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

Secs. 120, 121, 87, 88; White v. Spaulding, 14 N. W. Rep. 684.

§ 110. **Hearing issues.** At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided, and the court must hear and determine the issues raised.

Sec. 112; McClure v. Brown, 9 N. W. Rep. 906.

§ 111. **Notice by publication.** If the executor or administrator has absconded or concealed himself, or has removed or absented himself from the territory, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

Code Civ. Proc. Dak. 104. Agent to receive service. Sess. Laws 1883, *c.* 106.

§ 112. **Compulsory attendance.** In the proceedings authorized by the preceding four sections, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions on oath, touching his administration, and upon his refusal to do so may commit him until he obey, or may revoke his letters, or both.

Secs. 120, 121.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

ARTICLE I.—INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

§ 113. **Inventory of estate.** Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, except the homestead, if any, which has come to his possession or knowledge.

Additional inventory. See. 121.
Guardian's inventory. Sec. 355.
Inventory by surviving partner. Sec. 214.
" of personal property exempt. Sec. 128.
" of additional allotment. Sec. 129.
Territory of Dakota v. Bramble, 5 N. W. Rep. 945.

§ 114. **Appraiser's duties—fees.** To make the appraisement, the judge must appoint three disinterested persons, any of whom may act, who are entitled to receive a reasonable compensation for their services, not to exceed two dollars per day, to be allowed by the court. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county, the same appraisers may proceed to view and appraise the same, or other appraisers in that county may be appointed to perform that duty, by the judge of the probate court of the county in which the letters were issued, as he may deem best, and the like report must be made in each case direct to the probate court of the county which issued the letters.

Sec. 115.

§ 115. **Oath—inventory—contents.** Before proceeding to the execution of their duty, the appraisers must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles respectively; the inventory must contain all the estate of the decedent, real and personal, except the homestead, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest, or security.

§ 116. **Money received.** The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

§ 117. **Executor's personal debt.** The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

§ 118. **Bequest to, construed.** The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts; if not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

§ 119. **Return of inventory.** The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath, before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

§ 120. **Refusal—revocation.** If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the judge shall, for a reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

§ 121. **Additional inventory.** Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

§ 122. **Possession by representative.** The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, except the realty and improvements thereon properly belonging to the homestead, and such personal property as is reserved by law to the widow and children of the decedent, or either of them, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon, which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator.

Secs. 102, 124, 125, 210, 211, 212, 213, 218; Schwickerath v. Lochen, 4 N. W. Rep. 805; Connolly v. Connolly, Id. 233; Foster v. Gile, 7 N. W. Rep. 555; Miller v. Hoberg, 22 Minn. 249.

§ 123. **Term of possession.** Unless it satisfactorily appears to the probate court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law, or devisees.

ARTICLE II.—EMBEZZLEMENT AND SURRENDER OF PROPERTY TO THE ESTATE.

§ 124. **Embezzlement before letters.** If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Secs. 212, 215.

§ 125. **Complaint—examination.** If any executor, administrator, or other person interested in the estate of a decedent, complains to the probate court, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contains evidence of, or tend to disclose, the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any *lost* [last] will, the judge may cite such person to appear before the probate court, and may examine him, on oath, upon the matter of such complaint, if he can be found in the territory. But if cited from another county, and he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

§ 126. **Commitment—disclosure.** If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the probate court may take an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the probate court. The order for such disclosure, made upon such examination, is *prima facie* evidence of the right of such administrator to judgment recovered therein; must be for double the value of the property as assessed by the district court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

§ 127. **Account by third persons.** The probate judge, upon the complaint, on oath, of any executor or administrator, may cite any person, who has been intrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers, belonging to the estate, which have come to his possession in trust for the executor or administrator, and of proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.

CHAPTER V.

OF THE HOMESTEAD, AND OF THE ALLOTMENT OF PERSONAL PROPERTY.

§ 128. **Property immediately delivered to family.** Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age. [See chapter 38 of the Political Code, page 162.] And in addition thereto the following personal property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely:

1. All family pictures.
2. A pew or other sitting in any house of worship.
3. A lot or lots in any burial ground.
4. The family Bible, and all schoolbooks used by the family; and all other books used as a part of the family library, not exceeding in value one hundred dollars.
5. All wearing apparel and clothing of the decedent and his family.
6. The provisions for the family necessary for one year's supply, either provided or growing, or both; and fuel necessary for one year.
7. All household and kitchen furniture, including stoves, beds, bedsteads and bedding, not exceeding one hundred and fifty dollars in value.

The executor or administrator must make a separate and distinct inventory of all the personal property specified in this section, by articles, and opposite each article give the appraised value of the same, in dollars and cents, as given in the general inventory of the appraisers appointed by the court, and return the same to the probate court; and no such property shall be liable for any prior debts or claims whatever. (*As amended March 3, 1881.*)

Sec. 131; Pol. Code, Dak. c. 38; Territory of Dakota v. Bramble, 5 N. W. Rep. 945; Code Civ. Proc. Dak. 322–325.

§ 129. **Additional allotment.** In addition to the property mentioned in the preceding section, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children, of the decedent, all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court, to be, with the homestead, possessed and used by them; and the executor or administrator must make and return a separate and distinct inventory thereof, in the same manner as required for the property mentioned in the preceding section, and no such property shall be liable for any prior debts or claims against the decedent, except when there are no assets thereunto available for the payment of the necessary expenses of his last illness, funeral charges, and expenses of administration.

§ 130. **Selection of homestead.** If no homestead has been selected, marked out, platted, and recorded, as provided by the homestead law, the judge of the probate court must cause the same to be done according to the provisions of said law.

Sec. 136; Green v. Farrar, 5 N. W. Rep. 557.

§ 131. **Same exempt.** The homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the law relating to homesteads.

Pol. Code, Dak. c. 38; Code Civ. Proc. Dak. 322–325.

§ 132. **Family allowance.** If the amount so as aforesaid set apart be less than that allowed, and insufficient for the support of the widow and children, or either, or if there be no such personal property to be set apart, and if there be no other estate of the decedent, the court may, in its discretion, make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

Secs. 133, 136. Paid by preference. Sec. 261; Moore v. Moore, 12 N. W. Rep. 180.

§ 133. **Same—preferred claim.** Any allowance made by the court in accordance with the provisions of this chapter must be paid in preference to all other charges, except funeral charges or expenses of administration; and any such allowance, whenever made, may, in the discretion of the court, take effect from the death of the decedent.

§ 134. **Who receives property.** When personal property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child, the one-half of such property shall belong to the widow or surviving husband, and the other half to the minor child; and if the decedent left more than one minor child, the one-third of such property shall belong to the widow or surviving husband, and the remainder in equal shares to the minor children; and if the decedent left no widow or surviving husband, such property shall belong to the minor child, or, if more than one minor child, to them in equal parts.

Sec. 136.

§ 135. **Summary administration.** If, upon the return of the inventory of the personal estate of an intestate, it appears that the value of the whole personal estate does not exceed the sum of fifteen hundred dollars, the probate court, by a decree for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there be any, the whole of the estate, after the payment of the funeral expenses, the expenses of the last sickness, and expenses of the administration, and there must be no further proceedings in the administration unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this chapter, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases.

§ 136. **Widow's separate property.** If the widow has a maintenance derived from her own property, equal to the portion set apart to her by the preceding sections of this subdivision, the whole property so set apart, other than her right in the homestead, must go to the minor children.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

§ 137. **Notice to creditors.** Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge shall direct, but not less than once a week for four weeks. The judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

Secs. 265, 159.

§ 138. **Periods allowed.** The time expressed in the notice must be six months after its first publication, when the estate exceeds in value the sum of five thousand dollars, and four months when it does not.

§ 139. **Proof, approval, and record of notice.** After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit, or other testimony to the satisfaction of the court, an order or decree, showing that due notice to creditors has been given, must be made by the court and entered in the minutes and recorded.

§ 140. **Claims not presented, barred—exceptions.** If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the probate court, that the claimant had no notice, as provided in this chapter, by reason of being out of the territory, it may be presented at any time before a decree of distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever: *provided, however*, that when it is made to appear by the affidavit of the claimant, as above provided, that he had no notice, by reason of being out of the territory, it may be presented as therein provided.

Provided, further, that nothing in this section nor in this act contained, shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the mode prescribed by the Code of Civil Procedure, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by this Code. (*As amended March 1, 1881.*)

Secs. 148, 265; Code Civil Proc. Dak. 597–634; Palmer v. Pollock, 4 N. W. Rep. 1113; Brown v. Forsche, 5 N. W. Rep. 1011; Lannon v. Hackett, Id. 474; Wilcox v. Jackson, 10 N. W. Rep. 661; Way v. Stebbins, 11 N. W. Rep. 166; Mass. Mut. Life Ins. Co. v. Estate of Elliott, 24 Minn. 134.

Contingent claim. McKeen v. Waldron, 25 Minn. 466; sec. 263; Palmer v. Pollock, 4 N. W. Rep. 1113.

§ 141. **Proof of claims.** Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court.

Sec. 158; O'Connor v. Beckwith, 3 N. W. Rep. 166; Wilcox v. Jackson, 10 N. W. Rep. 661; Mass. Mut. Life Ins. Co. v. Estate of Elliott, 24 Minn. 134.

§ 142. **How allowed not proved.** When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed by the preceding section, and shall be proven by competent evidence to the satisfaction of the probate court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is *insolvent,* [solvent,] it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

Sec. 249; Bunnell v. Post, 25 Minn. 376.

§ 143. **Claim by probate judge.** Any judge of the probate court may present a claim against the estate of a decedent, for allowance, to the executor or administrator thereof; and if the executor or administrator allows or rejects the claim, he must in writing present the same to the county clerk of the county, who shall thereupon be substituted in the settlement of said estate in place of the probate judge, as provided by law, and the judge of the probate court presenting such claim, in case of its rejection by the executor or administrator, or by such county clerk, acting as judge, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. Secs. 4, 5.

§ 144. **Allowance and rejection of claims.** When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection.

If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is *prima facie* evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Secs. 151, 155, 158; Davis Sewing-machine Co. v. Bernard, 5 N. W. Rep. 411; Palms v. Lothrop, 7 N. W. Rep. 200; Campau v. Miller, 9 N. W. Rep. 140; Whitney v. Bird, 12 N. W. Rep. 530.

§ 145. **Claims filed in court.** Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part part thereof is secured by a mortgage or other lien which has been recorded or filed, according to law, in the office of the register of deeds of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien, and refer to the date of its filing and volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy of the same has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the judge in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

Sec. 248.

§ 146. **Suit on rejected claim.** When a claim is rejected, either by the executor or administrator, or the judge of the probate court, the holder must bring suit in the proper court, to-wit, before a justice of the peace or in the district court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due; or within two months, after it becomes due; otherwise the claim is forever barred.

Sec. 148; O'Connor v. Beckwith, 3 N. W. Rep. 166; Lannon v. Hackett, 5 N. W. Rep. 474; Dubois v. Dubois, 6 N. W. Rep. 261; Hall v. Thurman, 12

N. W. Rep. 141; Commercial Bank of Kentucky v. Slater, 21 Minn. 174. Agent to receive service. Sess. Laws 1883, *c.* 106.

§ 147. **Claims barred—examination.** No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to the judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any other legal evidence touching the validity of the claim.

Sperry v. Estate of Moore, 4 N. W. Rep. 13.

§ 148. **Presentment required.** No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator.

Secs. 140, 150, 153, 154; Lannon v. Hackett, 5 N. W. Rep. 474; Commercial Bank of Kentucky v. Slater, 21 Minn. 174.

§ 149. **Vacancy in administration.** The time during which there shall be a vacancy in the administration must not be included in any limitation herein prescribed.

§ 150. **Actions pending at death.** If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required.

§ 151. **Partial allowance.** Whenever any claim is presented to an executor or administrator, or to the judge of the probate court, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in an action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed.

Smith v. McFadden, 9 N. W. Rep. 350.

§ 152. **Effect of judgment.** A judgment rendered against an executor or administrator in the district court, or before a magistrate, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge of the probate court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment.

Berkey v. Judd, 8 N. W. Rep. 383.

§ 153. **Judgments before death—how collected.** When any judgment has been rendered for or against the testator or intestate in his life-time, no execution shall issue thereon after his death, except:

1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interests.

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If the execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands.

§ 154. **Death after verdict.** A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

§ 155. **Reference of claim.** If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter in controversy to some disinterested person, to be approved by the judge of the probate court. Upon filing the agreement and approval of the judge of the probate court in the office of the clerk of the district court for the county or judicial subdivision in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the probate court, and the report of the referee, if confirmed, establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and the probate judge.

Sec. 156; Campau v. Miller, 9 N. W. Rep. 140; In re Heath's Estate, 11 N. W. Rep. 723.

§ 156. **Referee's duties.** The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

§ 157. **Costs against representative.** When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Hei v. Heller, 10 N. W. Rep. 620; Turner's Appeal, 12 N. W. Rep. 493; In re Carroll's Will, 10 N. W. Rep. 375.

§ 158. **Claim by.** If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the judge of the probate court, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration. If, however, the judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge of the probate court, who may appoint an attorney at the expense of the estate, to defend the action. If the claimant recover no judgment he must pay all costs, including defendant's attorney's fee.

Spiegelburg v. Dowe, 5 N. W. Rep. 813; Crispin v. Winkleman, 10 N. W. Rep. 919.

§ 159. **Neglect to give creditors notice.** If an executor or administrator neglect for two months after his appointment to give notice to creditors, as prescribed by this subdivision, the court must revoke his letters, and appoint some other person in his stead, equally, or next in order, entitled to the appointment.

Sec. 265.

§ 160. **Statement of claims.** At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently presented to him. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

§ 161. **Payment of claims not due.** If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the probate court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to debts existing at the date this law goes into effect, unless the creditor consent to accept the amount.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I.—OF SALES IN GENERAL.

§ 162. **Property chargeable.** All the property of a decedent, except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband, and minor child or children, shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family. And the property, personal and real, may be sold as the court may direct, in the manner hereinafter prescribed. There shall be no priority as between personal and real property for the above purposes.

Sec. 196; State of Minnesota v. Probate Court, 25 Minn. 22.

§ 163. **Court orders all sales.** No sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise hereinafter provided. All sales must be reported under oath, and confirmed by the probate court, before the title to the property sold passes.

Secs. 164, 194; Humphrey v. Buisson, 19 Minn. (Gil.) 182.

§ 164. **Petitions for orders.** All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts, showing the sale to be necessary, will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

Secs. 163, 172, 180; Spencer v. Sheehan, 19 Minn. (Gil.) 292; State of Minnesota ex rel. Prendergast v. Probate Court, Id. 85.

§ 165. **But one sale.** When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, chargeable therewith, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in cases of perishable property, which may be sold as provided in the next section. The probate court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate chargeable therewith than sufficient to pay the same, may require but one proceeding for the sale of the entire available estate. In such case the petition must set forth all the facts required by section one hundred and seventy-two.

ARTICLE II.—SALES OF PERSONAL PROPERTY.

§ 166. **What sold without notice.** At any time after receiving letters the executor, administrator, or special administrator may apply to the judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale.

§ 167. **Prerequisities to sales.** If claims against the estate have been allowed, and a sale of property is necessary for their payment, or the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interest of the estate, he may, at any time after filing the inventories, in like manner and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, remaining and not set apart, whether necessary to pay debts or not.

Sec. 169; Spencer v. Sheehan, 19 Minn. (Gil.) 292; State of Minnesota v. Probate Court, 25 Minn. 22.

§ 168. **Partnership and claims.** Partnership interests, or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

§ 169. **Causes for sales—what sold.** If it appear that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate, and the persons intersted in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct.

Sec. 167.

§ 170. **Method and notice of sale.** The sale of personal property must be made at public auction, and after public notice given for at least fifteen days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless, for good reasons shown, the court or judge orders a private sale, or a shorter notice. Public sales of such property must be made at the court-house door, or at the residence of the decedent, or at some other public place, but no sale shall be made of any personal property, which is not present at the time of sale, unless the court or judge otherwise order.

Wilson v. Thompson, 3 N. W. Rep. 699.

ARTICLE III.—SALES OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATIONS THEREOF.

§ 171. **When sale necessary.** When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against a decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate, in his hands and chargeable for that purpose, upon the order of the probate court; and an application for the sale of real property may also embrace the sale of personal property.

Secs. 261, 172, 206; Pratt v. Houghtailing, 8 N. W. Rep. 72; Oberstein v. Oswalt, 10 N. W. Rep. 360.

§ 172. **Requisites of petition for sale.** To obtain an order for the sale of real property, he must present a verified petition to the probate court, or to the judge thereof, setting forth the amount of personal property that has come into his hands as assets, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and the estimate of what will or may accrue during the administration; a general description of all the real property, except the homestead, of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; the names of the legatees and devisees, if any, and the heirs of the decedent, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary, will not invalidate the subsequent proceedings, if the defect be supplied by the proofs of the hearing, and the general facts showing such necessity, be stated in the decree.

Secs. 164, 180, 171, 206; Pratt v. Houghtailing, 8 N. W. Rep. 72; Rumrill v. First Nat. Bank of St. Albans, 9 N. W. Rep. 731; Oberstein v. Oswalt, 10 N. W. Rep. 360; Wilson v. Staunton, Id. 792; Spencer v. Sheehan, 19 Minn. (Gil.) 292.

§ 173. **Order for hearing.** If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of such real estate for the purposes and reasons mentioned in the preceding section, or of any of them, such petition must be filed, and an order thereupon made directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

Oberstein v. Oswalt, 10 N. W. Rep. 360.

§ 174. **Service, on whom—waiver.** A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper of the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with and the hearing may be had at any time.

Sec. 311.

§ 175. **Hearing, unless written consent.** The probate court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proof of the petitioners, and of persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing.

§ 176. **Compulsory attendance.** The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the judge of the probate court in the same manner and with like effect as in other cases.

§ 177. **All realty may be sold.** If it appear necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after such sale the residue would be so small in quantity or value, or would be of such a character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or of any part thereof necessary and for the best interest of all concerned.

§ 178. **Order of sale.** If the court be satisfied, after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial.

Rumrill v. First Nat. Bank of St. Albans, 9 N. W. Rep. 731.

§ 179. **Contents of order—terms and method of sale.** The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or may be for one-third cash, and the balance on a credit not exceeding two years, payable in gross, or in installments within that time, with interest, as the court may direct. The land may be sold in one parcel, or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested.

§ 180. **Petition for sale by others.** If the executor or administrator neglects to apply for any order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters required for the petition of the executor or administrator as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

Secs. 164, 172; Rumrill v. First Nat. Bank of St. Albans, 9 N. W. Rep. 731.

§ 181. **Notice of sale.** When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

Wilson v. Thompson, 3 N. W. Rep. 699; Rumrill v. First Nat. Bank of St. Albans, 9 N. W. Rep. 731; Dayton v. Mintzer, 22 Minn. 393.

§ 182. **Place and time of sale.** Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

§ 183. **Private sale—notice—bids.** When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such paper as the court may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the judge of the probate court, to which the return of sale must be made, at any time after the first publication of notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight, days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

Sec. 184; Humphrey v. Buisson, 19 Minn. (Gil.) 182.

§ 184. **Limit of price—reappraisement.** No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

§ 185. **Security for credit.** The executor or administrator must, when the sale is made upon a credit, take the notes of a purchaser for the purchase money, with a mortgage on the property to secure their payment.

§ 186. **Return of sale—hearing—resale.** The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the probate court, which must be filed by the judge, at any time subsequent to the sale, either in term or vacation. If the sale be made at public auction, and the return is made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction a hearing upon the return of proceedings be asked for in the return, or is brought on for a hearing upon a day before the first day of the next term thereafter or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the judge, by notices posted in three public places, in the county, or by publication in a newspaper, or both, as he may deem best, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale, in all respects, conducted as if no previous sale had taken place. If an offer ten per cent. more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer, and confirm the sale to such person, or to order a new sale.

§ 187. **Objections to sale.** When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections.

§ 188. **Confirming order — resale.** If it appear to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section 231 [186] be made and accepted by the court, the court must make an order confirming the sale and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it, and directing conveyances to be executed, must be recorded in the office of the register of deeds of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Secs. 225, 288, 309; Dayton v. Mintzer, 22 Minn. 393; Dawson v. Helmes, 14 N. W. Rep. 462.

§ 189. **Conveyance and record—effect of.** Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the register of deeds, by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises at the time of his death. If, prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises other than, or in addition to, that of the decedent at the time of his death, such right, title, or interest also passes by such conveyance.

Sec. 201; Stebbins v. Field, 5 N. W. Rep. 394; State of Minnesota v. Probate Court, 19 Minn. (Gil.) 85.

§ 190. **Proof before order.** Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

§ 191. **Postponement of sale.** If, at the time appointed for the sale, the executor or administrator deems it for the interest of the persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

Sec. 192.

§ 192. **Notice of same at place.** In case of a postponement, notice thereof must be given by a public declaration, at the time and place first appointed for the sale; and if the postponement be for more than one day, further notice must be given by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Sec. 191.

§ 193. **Will must be followed.** If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

Secs. 194, 195.

§ 194. **Sales under will—confirmation.** When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the probate court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court.

Sec. 193.

§ 195. **Preferred property.** If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this article.

Sec. 193.

§ 196. **Property liable for debts, etc.** The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Secs. 197, 162.

§ 197. **Contribution from all.** When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the probate court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively for the purpose of paying such contribution.

Secs. 196, 273; Shannon v. Shannon, 12 N. W. Rep. 42.

§ 198. **Contract to purchase land.** If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

§ 199. **Terms of such sale.** The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate court until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve.

Secs. 200, 201.

§ 200. **Bond from purchaser.** The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

Secs. 199, 201.

§ 201. **Transfer of title.** Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold, at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

Secs. 189, 199, 200.

§ 202. **Liens on realty paid.** When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest and any lawful costs and charges thereon, may be paid into the probate court, to be received by the judge thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the judge without delay, in payment of the expenses of the sale, and in satisfaction of the debt, to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the judge otherwise directs.

Sec. 258; Detroit F. & M. Ins. Co. v. Aspinwall, 12 N. W. Rep. 214.

§ 203. **Lienor may purchase.** At any sale under order of the probate court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment *pro tanto*. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the judge an amount sufficient to pay such expenses.

§ 204. **Misconduct of sale.** If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

§ 205. **Fraudulent sale.** Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

§ 206. **Actions to recover limited.** No action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

Secs. 387, 388.

§ 207. **Legal disabilities.** The preceding section shall not apply to minors, or others under any legal disability, to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

Secs. 387, 388.

§ 208. **Account of sales.** When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglect to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made.

§ 209. **Representative not purchaser.** No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

Watkins v. Zwietusch, 3 N. W. Rep. 35; Welsh v. McGrath, 13 N. W. Rep. 638; Baldwin v. Allison, 4 Minn. (Gil.) 11.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

§ 210. **Possession, powers, and duties.** The executor or administrator must take into his possession all the estate of the decedent, real and personal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title.

Administrator—Powers and duties of.

To collect and possess the entire estate. Secs. 122, 98, 102.
To sue for recovery of property embezzled. Secs. 124–127.
" " " generally, for claims due estate. Secs. 211, 295, 230.
" " " damages from waste or conversion. Secs. 212, 213.
" " " rescission of fraudulent conveyance. Sec. 218.
" " " predecessor for account. Sec. 215.
" complete conveyances of property. Secs. 221–231.

To notify creditors to present their claims. Secs. 137, 159, 265.
Not to purchase at probate sale. Sec. 209.
" " make profit to prejudice of estate. Sec. 234.
" " purchase claims against estate. Sec. 237.
To sue for damages causing death of intestate. Code Civil Proc. Dak. 676, 677.

Administrator—Liabilities of.

To account for entire estate received. Secs. 232, 240, 246.
" " not for debts uncollected without his fault. Sec. 235.
" " " " verbal promise to pay debt of testator. Sec. 232.
For debts ordered paid. Sec. 264.
" property sold without order, when. Sec. 166.
" fraudulent sale of property. Sec. 205.
" misconduct of sale. Sec. 204.
" costs, when. Sec. 157.
" failure to give notice to creditors. Sec. 159, 265.
" waste or conversion. Sec. 108–112, 212.
" removal and suspension. Secs. 88, 92, 101, 108, 109, 112, 208, 247, 310, 247.

Schwickerath v. Lochen, 4 N. W. Rep. 805; Mower's Appeal, 12 N. W. Rep. 646; Darr v. Darr, Id. 765; Baldwin v. Allison, 4 Minn. (Gil.) 11.

§ 211. **Actions by and against.** Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases and in the same courts in which the same might have been maintained by or against their respective testators or intestates.

Secs. 122, 212, 213; Foster v. Gile, 8 N. W. Rep. 217; George v. Ry. Co. Id. 374; Schwickerath v. Lochen, 4 N. W. Rep. 805; Mower's Appeal, 12 N. W. Rep. 646; Baldwin v. Allison, 4 Minn. (Gil.) 11; Boutiller v. Steamboat Milwaukee, 8 Minn. (Gil.) 72; Caine v. Ry. Co. 14 Minn. (Gil.) 49; Miller v. Hoberg, 22 Minn. 249.

Agent to receive service. Sess. Laws 1883, c. 106.

§ 212. **Waste and conversion.** Executors and administrators may in like manner maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate in his life-time. They may also maintain actions for trespass committed on the real estate of the decedent in his life-time.

Sec. 124; Noon v. Finnegan, 13 N. W. Rep. 197; Pott v. Pennington, 16 Minn. (Gil.) 460.

§ 213. **Same—against representatives.** Any person, or his personal representatives, may maintain an action against the executor or administrator of any testator or intestate who in his life-time has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Secs. 210, 246; Allen v. Corbett, 1 N. W. Rep. 771; O'Gorman v. Lindeke, Id. 841; Territory of Dakota v. Bramble, 5 N. W. Rep. 945; Brown v. Forsche, Id. 1011.

§ 214. **Inventory and bond by surviving partner.** When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner shall immediately, in company with the executor or administrator, or some other person or persons, to be appointed by the judge of the probate court, take and furnish to said executor or administrator a correct and full inventory, and a fair and just appraisement, of all partnership property and assets held and belonging to himself and the deceased partner, after which the surviving partner shall settle the business of the co-partnership. The surviving partner shall settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of the decedent. Upon the application of the executor or administrator, the judge of the probate court shall in all cases require the surviving partner to give a good and sufficient bond, to be approved by the judge of the probate court, for the honest and faithful disposal of the interest of the decedent in the copartnership, and the prompt payment of the proceeds thereof over to the executor or administrator, and, in case of neglect or refusal, may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

§ 215. **Actions against predecessor.** An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

Secs. 212, 246; Wilkinson v. Estate of Winne, 15 Minn. (Gil.) 123; Palmer v. Pollock, 4 N. W. Rep. 1113.

§ 216. **Joinder of parties.** In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

§ 217. **Compounding debts.** Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized, when it appears to be just, and for the best interest of the estate.

§ 218. **Recovery of fraudulent conveyances.** When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his life-time, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditor, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his life-time, whatever may have been the manner of such fraudulent conveyance.

Hoy v. Cowgill, 2 N. W. Rep. 961; Twist v. Babcock, 12 N. W. Rep. 680; O'Connor v. Boylan, 13 N. W. Rep. 519; Bennett v. Schuster, 24 Minn. 383.

§ 219. **Creditors may require same.** No executor or administrator is bound to sue for such estate as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security therefor to the executor or administrator, as the judge shall direct.

§ 220. **Sale of such realty.** All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hands of the executor or administrator.

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

§ 221. **Deeds by decedent's contract.** When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

Civil Code, Dak. §§ 622, 993; Lamb v. Hinman, 8 N. W. Rep. 709.

§ 222. **Petition for, and notice.** On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the probate judge must appoint a time and place for hearing the petition, at a regular term of court, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this territory as he may designate.

§ 223. **Hearing.** At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner, and all who may be produced before him for that purpose.

§ 224. **Decree.** If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court, and recorded.

Secs. 299, 231.

§ 225. **Deed and record—effect.** The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the register of deeds of the county where the lands lie, and is *prima facie* evidence of the correctness of the proceedings and of the authority of the executor or administrator to make the conveyance.

Secs. 188, 288, 301, 309; Civil Code, Dak. 647–675.

§ 226. **Dismissal and appeal.** If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed in the district court to enforce a specific performance thereof.

§ 227. **Effect of conveyance.** Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.

§ 228. **Decree gives possession.** A copy of the decree for a conveyance, made by the probate court, and duly certified and recorded in the office of the register of deeds of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the conveyance, in like manner as if they had been conveyed in pursuance of the decree.

Sec. 229; Code Civil Proc. Dak. 308, 310.

§ 229. **Enforcing decree.** The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

Sec. 228; Code Civ. Proc. Dak. 308, 310.

§ 230. **Death of claimant.** If the person entitled to the conveyance die before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings, or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

§ 231. **Surrender ordered by decree.** The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed, and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE I.—LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 232. **Requisites of contract by representative.** No executor or administrator is chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or adminstrator, or by some other person by him thereunto specially authorized.

§ 233. **With what property charged.** Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of such estate.

§ 234. **Neither profit nor loss.** He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any part be sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

Loomis v. Armstrong, 14 N. W. Rep. 505; Watkins v. Zwietusch, 3 N.W. Rep. 35; sec. 237.

§ 235. **Uncollected debts.** No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

§ 236. **Pay for services and expenses.** He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as are provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument, filed in the probate court, he renounces all claim for compensation provided by the will.

Sec 238; Mower's Appeal, 12 N.W. Rep. 646; Lommen v. Tobiason, 3 N. W. Rep. 715.

§ 237. **Not purchase claims.** No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Sec. 234; Watkins v. Zwietusch, 3 N. W. Rep. 35; Welsh v. McGrath, 13 N. W. Rep. 638.

§ 238. **Fees and commissions.** When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, excluding all property not ranked as assets, as follows: For the first thousand dollars, at the rate of five per cent.; for all above that sum, and not exceeding five thousand dollars, at the rate of four per cent.; for all above that sum, at the rate of two and one-half per cent.; and the same commission must be allowed administrators. In all cases such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section.

Sec. 236; Lommen v. Tobiason, 3 N. W. Rep. 715.

ARTICLE II.—ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

§ 239. **Full statement.** At the third term of the court after his appointment, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

O'Gorman v. Lindeke, 1 N. W. Rep. 841.

§ 240. **Citation upon failure.** If the executor or administrator fail to render an exhibit at the third term of the court, the judge of the probate court must issue a citation requiring him to appear and render it.

§ 241. **Petition for, by third person.** Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

§ 242. **Action upon same.** If the judge be satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must issue a citation to the executor or administrator, requiring him to appear at some day named in the citation, which must be during a term of the court, and render an exhibit as prayed for.

§ 243. **Contest of exhibit.** When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

In re Rathbone, 6 N. W. Rep. 115; Eccard v. Brush, 11 N. W. Rep. 756; In re Heath's Estate, Id. 723.

§ 244. **Compulsory attendance.** If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

§ 245. **Full account in one year.** Every executor or administrator must render a full account and a report of his administration at the expiration of one year from the time of his appointment. If he fail to present his account, the court must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account rendered must exhibit, not only the debts which have been paid, but also a statement of all the debts which have been duly presented and allowed during the period embraced in the account.

§ 246. **Account to successor.** When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

Sec. 215.

§ 247. **Revocation.** If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed, where the attachment has been executed, his letters must be revoked.

Sec. 210. Agent to receive service. Sess. Laws 1883, *c.* 106.

§ 248. **Vouchers to account.** In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Secs. 142, 249.

§ 249. **Items without vouchers.** On the settlement of his account he may be allowed any item of expenditure, not exceeding fifteen dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath, reduced to writing, and certified by the judge, positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed three hundred dollars against any one estate, nor over ten per cent. of the inventory appraised value of any estate under three thousand dollars.

§ 250. **Notice for settlement.** When any account is rendered for settlement, the court or judge must appoint a day for the settlement thereof. The judge must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or judge may order such further notice to be given as may be proper.

Sec. 255.

§ 251. **Requisites for notice of final settlement.** If the account mentioned in the preceding section be for a final settlement, and the estate be ready for distribution, the notice of the settlement must state these facts, and must be served, published, or waived in the same manner as provided for sales of real property and interests therein; and on confirmation of the final account distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. If, from any cause, the hearing of the account, or the partition and distribution, be postponed, the order postponing the same to a day certain is notice to all persons interested therein.

§ 252. **Exceptions to account.** On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

Mower's Appeal, 12 N. W. Rep. 646.

§ 253. **What heirs may contest—hearing.** All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation, and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

§ 254. **Effect of allowance.** The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of such account is *prima facie* evidence of its correctness.

Oakes v. Estate of Buckley, 6 N. W. Rep. 321; Kows v. Mowery, 10 N. W. Rep. 283.

§ 255. **Proof of notice—decree.** The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

§ 256. **Personalty sold, when.** Whenever it appears to the court, on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

§ 257. **Investments of funds.** Pending the settlement of any estate on the petition of any party interested therein, the probate court may order any moneys in the hands of the executor or administrators to be invested, for the benefit of the estate, in securities of the United States. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the judge.

Lommen v. Tobiason, 3 N. W. Rep. 715; Dennis v. Kent Circuit Judge, Id. 950.

ARTICLE III.—THE PAYMENT OF DEBTS OF THE ESTATE.

§ 258. **Order of payment.** The debts of the estate must be paid in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States.
4. Judgments rendered against the decedent in his life-time, and mortgages, in the order of their date.
5. All other demands against the estate.

Funeral charges. Secs. 129, 133, 135, 261.
Expenses of last illness. Secs. 129, 135, 261.
Expenses of administration. Secs. 129, 135, 193, 195, 236, 261, 171.
Mortgage. Secs. 259, 153, 202, 140; Sess. Laws 1881, *c.* 107.
Judgments. Secs. 152, 153, 154.
Lanier v. Irvine, 24 Minn. 117; Samuel v. Estate of Thomas, 8 N. W. Rep. 361; In re Wilson, Id. 830.

§ 259. **Limit as to mortgage.** The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property be insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

§ 260. **Equal within classes.** If the estate be insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any class shall receive any payment until all those of the preceding class are fully paid.

§ 261. **When certain expenses paid.** The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

Sec. 258; Samuel v. Estate of Thomas, 8 N. W. Rep. 361.

§ 262. **Order for payment of debts.** Upon the settlement of the accounts of the executor or administrator, at the end of the year, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there be not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole assets of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court.

Lanier v. Irvine, 24 Minn. 117.

§ 263. **Advance payments—solvency.** If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a *pro rata* distribution is ordered.

§ 264. **Liable for debts ordered paid.** When a decree is made by the probate court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decrees, as upon judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor, on his bond, to each creditor.

Palms v. Lothrop, 7 N. W. Rep. 200; Breining v. Schneider, 9 N. W. Rep. 441; Wood v. Myrick, 16 Minn. (Gil.) 447.

§ 265. **Other liability.** When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to creditors as required in the first and second sections of chapter six, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

Sec. 159.

§ 266. **Extension of time.** If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate.

§ 267. **Final account and settlement.** At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administrator.

Kows v. Mowery, 10 N. W. Rep. 283; Loomis v. Armstrong, 14 N. W. Rep. 505.

§ 268. **Provisions applying to.** If he neglect to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I.—PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

§ 269. **Petition for legacy or share.** At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bond, with security, for the payment of his proportion of the debts of the estate.

§ 270. **Notice to representative.** Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Secs. 302, 303, 304, 305.

§ 271. **Who may resist.** The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

McCard v. Circuit Judge, 7 N. W. Rep. 907.

§ 272. **When petition allowed—conditions—partition.** If at the hearing it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the probate judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.
2. The executor or administrator to deliver to the heir, legatee, or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it.

If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings to be paid by the applicant; or, if there be more than one, to be apportioned equally among them.

§ 273. **Assessment against legatee or devisee.** When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Secs. 197, 265.

ARTICLE II.—DISTRIBUTION AND FINAL SETTLEMENT.

§ 274. **Court distributes—deceased heir—settlement.** Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child was entitled to by inheritance, must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Sec. 290; Ramsey v. Abrams, 12 N. W. Rep. 555.

§ 275. **Decree of distribution — contents — effect.** In the order or decree, the court must name the persons, and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

Greenwood v. Murray, 2 N. W. Rep. 945; Dickison v. Reynolds, 12 N. W. Rep. 24; Ramsey v. Abrams, Id. 555; Wood v. Myrick, 16 Minn. (Gil.) 447.

§ 276. **Delivery to executor under foreign will.** Upon application for the distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this territory, leaving a will which has been duly proved or allowed in the state, territory, or district of his residence, and an authenticated copy thereof has been admitted to probate in this territory, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this territory should be delivered to the executor or administrator in the estate or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed in this territory, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the probate court.

§ 277. **Petition and notice for decree.** The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

Greenwood v. Murray, 9 N. W. Rep. 629; Minkler v. Woodruff, 11 N. W. Rep. 296.

§ 278. **Taxes paid before decree.** Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all territorial, county, school, and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

ARTICLE III.—DISTRIBUTION AND PARTITION.

§ 279. **Partition by three commissioners.** When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules, as if three were appointed.

§ 280. **Petition for, and notice.** Such partition may be ordered and had in the probate court, on the petition of any person interested. But before commissioners are appointed, or partition ordered by the probate court, as directed in this subdivision, notice thereof must be given to all persons interested, who reside in this territory, or their guardians, and to the agents, attorneys, or guardians, if any, in this territory, of such as reside out of the territory, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

§ 281. **Realty in different counties.** If the real estate is in different counties, the probate court may, if deemed proper, appoint commissioners for all, or different commissioners for each county.

The whole estate, whether in one or more counties, shall be divided among the heirs, devisees, or legatees as if it were all in one county, and the commissioners must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this territory.

§ 282. **When part conveyed.** Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

§ 283. **How shares set apart.** When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

§ 284. **Joint shares — preferences — difference paid.** When the real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to shares therein, who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

§ 285. **Whole to one party—excess paid.** When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

§ 286. **Sale of whole.** When it appears to the court, from the commissioner's report, that it cannot be otherwise fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commission appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements as provided in article three, chapter seven, of this title.

§ 287. **Notice to all before partition.** Before any partition is made, or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

§ 288. **Report by commissioners—confirmation—record.** The commissioners must report their proceedings and the partition agreed upon by them to the probate court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the judge, under the seal of the court, must be recorded in the office of the register of deeds of the county where the lands lie.

Secs. 309, 188, 225, 301.

§ 289. **Residue assigned.** When the probate court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

§ 290. **Advancements—contents of decree.** All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the probate court, or in case of an appeal of the district court or supreme court, is binding on all parties interested in the estate.

Sec. 275; Ramsey v. Abrams, 12 N. W. Rep. 555.

ARTICLE IV.—AGENTS FOR ABSENT PARTIES—DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

§ 291. **Agent for non-resident.** When any estate is assigned or distributed by a judgment or decree of the probate court, to any person residing out of and having no agent in this territory, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

§ 292. **Bond by agent—pay.** The agent must first give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

Sec. 295.

§ 293. **Sale of such property.** When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the territorial treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the territorial auditor, and the other in the probate court.

§ 294. **Agent's account—requisites.** The agent must render to the probate court appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.
2. The income derived therefrom.
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.
4. Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid.

When filed the probate court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the territorial treasury, to be receipted for, and the receipts filed as in like cases before provided.

§ 295. **Liability on bond.** The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

Sec. 292.

§ 296. **Claimant for property.** When any person appears and claims the money paid into the treasury, the probate court making the distribution must inquire into such claim, and, being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him the territorial auditor must draw a warrant on the treasurer for the amount.

§ 297. **Decree discharging representative.** When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

Secs. 248, 249–255, 299; Dickison v. Reynolds, 12 N. W. Rep. 24; Daniels v. Smith, Id. 599.

§ 298. **Subsequent property discovered.** The final settlement of an estate, as hereinafter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper, for any cause, that letters should be again issued.

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS, AND APPEALS.

ARTICLE I.—ORDERS, DECREES, PROCESS, MINUTES, RECORDS, AND TRIALS.

§ 299. **Requisites—record.** Orders and decrees made by the probate court, or the judge thereof, need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute-book of the court, and upon the close of each regular or special term the judge must sign the same.

§ 300. **Publication—how.** When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court or judge may, however, order a less number of publications during the period.

§ 301. **Notice imparted by recorded decree.** When it is provided in this title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county register of deeds, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

§ 302. **Citations—requisites of.** Citations must be directed to the person to be cited, signed by the judge, and issued under the seal of the court, and must contain:

1. The title of the proceeding.
2. A brief statement of the nature of the proceeding.
3. A direction that the person cited appear at a time and place specified.

§ 303. **Service of.** The citation must be served in the same manner as a summons in a civil action.

§ 304. **Personal notice.** When a personal notice is required, and no mode [of] giving it is prescribed in this title, it must be given by citation.

§ 305. **Time of service.** When no other time is specially prescribed in this title, citations must be served at least five days before the return-day thereof.

§ 306. **Description of realty.** When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

Secs. 172, 181; Code Civil Proc. Dak. §§ 601, 637.

§ 307. **Trials—findings—judgments—executions.** All issues of facts joined in the probate court must be tried by said court, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. After the hearing the court shall give, in writing, the findings of facts and conclusions of law. Judgments thereon, as well as for costs, may be entered and enforced by execution or otherwise, by the probate court, as in civil actions. If the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and upon which the court may render judgment.

§ 308. **Attorneys appointed by court.** At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmations thereof; settlements, petitions, and distributions of estates; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the territory, and those interested, who, though they are neither such minors nor non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee to be fixed by the court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the probate court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

§ 309. **Decree recorded in register's office.** When a judgment or decree is made, setting apart and defining the homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the register of deeds of the county in which the real property is situated.

Sec. 301.

§ 310. **Revocation for contumacy.** Whenever an executor, administrator, or guardian is committed for contempt in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person, entitled thereto, executor, administrator, or guardian in his stead.

§ 311. **Service upon guardian.** Whenever an infant, insane or incompetent person has a guardian of his estate residing in this territory, personal service upon the guardian of any process, notice, or order of the probate court concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward; and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

ARTICLE II.—OF APPEALS AND BONDS.

§ 312. **Decisions from which appeals lie.** An appeal may be taken to the district court from a judgment, decree, or order of the probate court:

1. Granting, or refusing, or revoking letters testamentary, or of administration, or of guardianship.
2. Admitting, or refusing to admit, a will to probate.
3. Against or in favor of the validity of a will, or revoking the probate thereof.
4. Against or in favor of setting apart property, or making an allowance for a widow or child.
5. Against or in favor of directing the petition, sale, or conveyance of real property.
6. Settling an account of an executor, or administrator, or guardian.
7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or,
8. From any other judgment, decree, or order of the probate court, or of the judge thereof, affecting a substantial right.

Maerchen v. Stall, 4 N. W. Rep. 352; Shelden v. Wallbridge, 6 N. W. Rep. 681.

§ 313. **Who may appeal.** Any party aggrieved may appeal as aforesaid, except where the decree or order of which he complains was rendered or made upon his default.

§ 314. **Same.** A person interested in the estate or fund affected by the decree or order, who was not a party to the special proceeding in which it was made, but who was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired, may also appeal as prescribed in this article. The facts, which entitle such a person to appeal, must be shown by an affidavit, which must be filed with the notice of appeal.

§ 315. **Period in which appeal taken.** An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days, from the date of the judgment, decree, or order appealed from.

§ 316. **Appeal, how taken.** The appeal must be made:

1. By filing a written notice thereof with the judge of the probate court stating the judgment, decree, or order appealed from, or some specific part thereof, and whether the appeal is on a question of law, or of fact, or of both, and, if of law alone, the particular grounds upon which the party intends to rely on his appeal; and,

2. By executing and filing, within the time limited in the preceding section, such bond as is required in the following sections.

It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the probate court.

§ 317. **Bond—requisites of.** The appeal bond shall be in such sum as the judge of the probate court shall require and deem sufficient, with at least two sufficient sureties to be approved by the judge, conditioned that the appellant will prosecute his appeal with due diligence to a determination, and will abide, fulfill, and perform whatever judgment, decree, or order may be rendered against him in that proceeding by the district court, and that he will pay all damages which the opposite party may sustain by reason of such appeal, together with all costs that may be adjudged against him.

Spiegelburg v. Dowe, 5 N. W. Rep. 813; Carpenter v. Judge of Probate, 12 N. W. Rep. 197; Casey v. Peebles, Id. 840; Schuek v. Hagar, 24 Minn. 339.

§ 318. **Stay—effect of appeal.** If the judgment, decree, or order appealed from be for, or direct, the payment of money, or the delivery of any property, or grant leave to issue an execution, the appeal shall not stay the execution thereof, unless the appeal bond be furthermore conditioned to the effect that if the judgment, decree, or order, or any part thereof, be affirmed, or the appeal be dismissed, the appellant shall pay the sum so directed to be paid or levied, or, as the case may require, shall deliver the property so directed to be delivered, or the part thereof as to which the judgment, decree, or order shall be affirmed.

§ 319. **Same—bond.** An appeal from any judgment, decree, or order directing the commitment of any person, does not stay the execution thereof unless the appeal bond be also to the effect that if the judgment, decree, or order appealed from be affirmed, or the appeal be dismissed, the appellant shall, within twenty days after such affirmance or dismissal, surrender himself in obedience to the judgment, decree, or order, to the custody of the sheriff to whom he was committed. If the condition of such bond be violated, it may be prosecuted in the same manner and with the same effect as an administrator's official bond; and the proceeds of the action must be paid or distributed, as directed by the probate court, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the county treasury.

Secs. 320, 321, 331.

§ 320. **Justification by sureties—new bond.** The sureties in every appeal bond must justify in the manner required in article six of chapter three of this title, and the respondent may apply to the appellate court or the judge thereof, upon notice, for an order requiring the appellant to increase the sum fixed by the judge of the probate court, or to give additional security; and if the applicant make default in giving a new bond, pursuant to an order to increase the same, or to give additional security, the appeal may be dismissed.

§ 321. **Form of bond—action upon.** Every appeal bond must be to the territory of Dakota, must contain the name and residence of each of the sureties thereto, and must be filed in the probate court. The judge of the probate court may, at any time in its discretion, make an order authorizing any person aggrieved to bring an action on the bond in his own name or in the name of the territory. When it is brought in the name of the territory, the damages collected must be paid over to the probate court, and therein distributed as justice may require.

Secs. 319, 331.

§ 322. **Letters issue notwithstanding appeal.** An appeal from a decree or order admitting a will to probate, or granting letters testamentary or letters of administration, does not stay the issuing of letters where, in the opinion of the probate judge, manifested by an entry upon the minutes of the court, the preservation of the estate requires that such letters should issue. But the letters so issued do not confer power to sell real property by virtue of any provision in the will, or to pay or satisfy legacies, or to distribute the property of the decedent among the next of kin, until the final determination of the appeal.

Sec. 332; Dutcher v. Culver, 23 Minn. 415.

§ 323. **Appeal does not stay, when.** An appeal from a decree or order revoking probate of a will, letters testamentary, letters of administration, or letters of guardianship, or from a decree or order suspending or removing an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or a person appointed by the probate court, or appointing an appraiser of personal property, does not stay the execution of the decree or order appealed from.

§ 324. **Transcript to district court—non-appearance.** The judge of the probate court must, within ten days from the filing of the notice of appeal and the giving of the required bond, cause a certified copy thereof, and of the judgment, decree, or order, or specific part thereof appealed from, and of the minutes, records, papers, and proceedings in the case, to be transmitted to the clerk of the district court of the county, or judicial subdivision, to be filed in his office; and the appeal may be heard and determined at any day thereafter by said court, at any general, special, or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed, or may open the record and move for an affirmance.

Sec. 327.

§ 325. **Parties named — powers of appellate court.** The plaintiff in the probate court shall be the plaintiff in the district court; and when the appeal is on questions of law alone, the appellate court may reverse, affirm, or modify the judgment, decree, or order, or the part thereof appealed from, and every intermediate order which it is authorized by law to review, in any respect mentioned in the notice of appeal, and as to any or all of the parties, and it may order a new hearing. Upon such appeal, so much of the evidence as may be necessary to explain the grounds, and no more, may be certified into the appellate court.

§ 326. **Trial de novo of fact by court.** When the appeal is on questions of fact, or on questions of both law and fact, the trial in the district court must be *de novo*, and shall be conducted in the same manner as if the case and proceedings had lawfully originated in that court; and such appellate court has the same power to decide the questions of fact which the probate court or judge had; and it may, in its discretion, as in suits in chancery, and with like effect, make an order for the trial by a jury of any or all the material questions of fact arising upon the issues between the parties; and such an order must state distinctly and plainly the questions of fact to be tried.

§ 327. **Neglect of probate record.** If the judge of the probate court neglect or refuse to make or transmit such certified copies as are hereinbefore required to be transmitted to the clerk of the district court in cases of appeal, he may be compelled by the district court, by an order entered upon motion, to do so, and he may be fined as for contempt for any such neglect or refusal. A certified copy of such order may be served upon the probate judge by the party or his attorney.

Sec. 324.

§ 328. **Dismissal is affirmance—amendment.** The dismissal of an appeal by the district court is in effect an affirmance of the judgment, decree, or order appealed from; and when an appellant shall have given, in good faith, notice of appeal, but omits, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the appellate court may permit an amendment on such terms as may be just.

§ 329. **Costs—how payable.** Such appellate court may award to the successful party the costs of the appeal; or it may direct that such costs abide the event of a new hearing, or of the subsequent proceedings in the probate court. In either case the costs may be made payable out of the estate fund, or personally by the unsuccessful party, as directed by the appellate court; or, if no such direction be given, as directed by the probate court.

§ 330. **Enforcement by probate court.** When a judgment, decree, or order, from which an appeal has been taken, is wholly or partly affirmed, or is modified by the judgment rendered by the district court upon such appeal, it must be enforced, to the extent authorized by the latter judgment, by the probate court, in like manner as if no appeal therefrom had been taken; and the district court must direct the proceedings to be remitted for that purpose to the probate court or to the judge thereof.

Daley's Appeal, 11 N. W. Rep. 262.

§ 331. **Official bonds good on appeal.** When an executor or administrator who has given an official bond appeals from a judgment, decree, or order of the probate court or judge, made in the proceedings had upon the estate of which he is administrator or executor, his said bond stands in the place of an appeal bond, and the sureties therein are liable on such appeal bond.

§ 332. **Lawful acts valid, when.** When the order or decree appointing an executor, or administrator, or guardian is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such order or decree had been affirmed.

CHAPTER XIII.

OF GUARDIAN AND WARD.

ARTICLE I.—GUARDIANS OF MINORS.

§ 333. **Of persons and estates.** The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the territory and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment, the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor.

§ 334. **When minor may nominate.** If the minor is under the age of fourteen years, the probate judge may nominate and appoint his guardian. If he is above the age of fourteen years he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly. And the probate court, in appointing a guardian, is to be guided by the considerations named in section one hundred and twenty-seven of the Civil Code.

Sec. 336.

§ 335. **When judge may appoint.** If the guardian nominated by the minor be not approved by the judge, or if the minor resides out of the territory, or if, after being duly cited by the judge, he neglects for ten days to nominate a suitable person, the judge may nominate and appoint the guardian in the same manner as if the minor was under the age of fourteen years.

§ 336. **Minor may appoint.** When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he has attained that age, may appoint his own guardian, subject to the approval of the probate judge.

§ 337. **Father or mother entitled.** The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor.

§ 338. **Guardian has custody.** If the minor has no father or mother living competent to have the custody and care of his education, the guardian appointed shall have the same.

Secs. 341, 348, 339.

§ 339. **Same until marriage.** Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged.

Sec. 384.

§ 340. **Bond to minor—requisites—letters—oath.** Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form and constitute a part of every such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order.

2. To dispose of and manage the estate according to law, and for the best interest of the ward, and faithfully to discharge his trust in

relation thereto, and also in relation to the care, custody, and education of the ward.

3. To render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office, as such guardian, according to law.

Secs. 341, 342, 377, 385, 386, 54, 55; Douglas v. Kessler, 7 N. W. Rep. 619; Douglas v. Kessler, 10 N. W. Rep. 313; Davis v. McCurdy, 7 N. W. Rep. 665; McWilliams v. Kalbach, Id. 463.

§ 341. **Additional conditions.** When any person is appointed guardian of a minor, the probate judge may, with the consent of such person, insert in the order of appointment conditions, not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions is a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond are responsible.

§ 342. **Record of letters and bond.** All letters of guardianship issued, and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the judge of the probate court having jurisdiction of the persons and estates of the wards.

§ 343. **Extra expenses.** If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

§ 344. **Testamentary guardian.** Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties, in regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

§ 345. **Guardian ad litem.** Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

Kelsey v. Kelsey, 10 N. W. Rep. 753.

ARTICLE II.—GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

§ 346. **Petition and notice.** When it is represented to the probate court, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

Appeal of Royston, 11 N. W. Rep. 36, 41.

§ 347. **Hearing — appointment.** If, after a full hearing and examination upon such petition, it appears to the judge of the probate court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

Smith v. Hickenbottom, 11 N. W. Rep. 664.

§ 348. **Powers—bond.** Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Sec. 340; In the Matter of Rice, 4 N. W. Rep. 284; Witt v. Mewhirter, 10 N. W. Rep. 890.

§ 349. **Proceedings to declare restoration.** Any person who has been declared insane, or the guardian or any relative of such person, within the third degree, or any friend, may apply, by petition to the probate court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane. Upon receiving the petition, the judge must appoint a day for the hearing, and cause notice of the trial to be given to the guardian of the petitioner, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the petitioner, and, in the discretion of the judge, any other person, may contest the right of the petitioner to the relief demanded. Witnesses may be required to appear and testify, as in other cases, and may be called and examined by the judge on his own motion. If it be found that the petitioner be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

Sec. 384.

ARTICLE III.—THE POWERS AND DUTIES OF GUARDIANS.

§ 350. **Payment of debts—sales.** Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided by law for the sale of real estate of decedents.

Secs. 171–209; White v. Iselin, 5 N. W. Rep. 359; Bates v. Dunham, 12 N. W. Rep. 309; Bunce v. Bunce, 13 N. W. Rep. 705.

§ 351. **Collect and pay debts—appear in courts.** Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the probate judge, compound for the same and give discharges to the debtors, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian or next friend.

Secs. 311, 350; Walter v. Wala, 4 N. W. Rep. 938; Kinney v. Harrett, 8 N. W. Rep. 708; Witt v. Mewhirter, 10 N. W. Rep. 890; Kelsey v. Kelsey, Id. 753; McKinney v. Jones, 11 N. W. Rep. 606; Hidden v. Chappel, 12 N. W. Rep. 687.

§ 352. **Rules governing management.** Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the probate court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

§ 353. **Maintenance and support.** When a guardian has advanced for the necessary maintenance, support, and education of his ward an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlement. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Latham v. Myers, 10 N. W. Rep. 924.

§ 354. **Assent to partition.** The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person.

§ 355. **Inventory and account.** Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of twenty thousand dollars, semi-annual returns must be made to the probate court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered, must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the judge of the probate court, in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Jacobs v. Fouse, 23 Minn. 51.

§ 356. **Settlement at end of year.** The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his accounts to the probate court for settlement and allowance.

Gott v. Culp, 7 N. W. Rep. 767; Latham v. Myers, 10 N. W. Rep. 924.

§ 357. **Account by one of joint guardians.** When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon oath of any of them.

§ 358. **Expenses and pay.** Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Gott v. Culp, 7 N. W. Rep. 767.

ARTICLE IV.—THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

§ 359. **Causes for sale.** When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Sec. 353; Wohlscheid v. Bergrath, 8 N. W. Rep. 548; Cassedy v. Casey, 12 N. W. Rep. 286; Dawson v. Helmes, 14 N. W. Rep. 462.

§ 360. **Sale for investment.** When it appears to the satisfaction of the court, upon the petition of the guardian, that, for the benefit of his ward, his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

§ 361. **Proceeds—how applied.** If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

§ 362. **Investment—how made.** If the estate be sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court.

§ 363. **Petition for sale.** To obtain an order for such sale, the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Ellsworth v. Hall, 12 N. W. Rep. 512.

§ 364. **Hearing and order.** If it appear to the court or judge, from the petition, that it is necessary, or would be beneficial to the ward, that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the court must order the sale to be made.

§ 365. **Service of order on whom.** A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served personally or by publication.

Secs. 302, 303, 304, 305.

§ 366. **Hearing upon order.** The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application.

§ 367. **Witnesses' attendance.** On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in cases provided for in the settlement of the estates of decedents.

§ 368. **Costs.** If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

§ 369. **Order for sale—contents.** If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

§ 370. **Bond by guardian.** Every guardian authorized to sell real estate, must, before the sale, give bond to the probate judge, with sufficient surety, to be approved by him, with condition to sell the same in the manner and to account for the proceeds of the sale as provided for in this chapter and chapter seven of this title.

§ 371. **Reference to law governing.** All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales, and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as provided and required by the provisions of law concerning the estates of decedents, unless otherwise specially provided in this chapter.

Secs. 162–209; White v. Iselin, 5 W. W. Rep. 359; Montour v. Purdy, 11 Minn. (Gil.) 279.

§ 372. **Time order in force.** No order of sale granted in pursuance of this article continues in force more than one year after granting the same, without a sale being had.

§ 373. **Terms of sale—security.** All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon.

§ 374. **Orders to invest.** The probate court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

Cassedy v. Casey, 12 N. W. Rep. 286.

ARTICLE V.—NON-RESIDENT GUARDIANS AND WARDS.

§ 375. **Guardians for non-resident ward.** When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this territory, and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the probate judge of any county in which there is any estate of such absent person, for the appointment of a guardian; and if, after notice given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

Sec. 378; Davis v. Hudson, 11 N. W. Rep. 136.

§ 376. **Powers.** Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within the territory, and with respect to the person of the ward, if he shall cease to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

Townsend v. Kendall, 4 Minn. (Gil.) 315.

§ 377. **Bond—exceptions.** Every such guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this territory.

Secs. 340, 341.

§ 378. **First appointment exclusive.** The guardianship which is first lawfully granted, of any person residing without this territory, extends to all the estate of the ward within the same, and excludes the jurisdiction of the probate court of every other county.

§ 379. **Removal of property.** When the guardian and ward are both non-residents, and the ward is entitled to property in this territory which may be removed to another territory, state, or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the territory, state, or foreign country of the residence of the ward, upon the application of the guardian to the judge of the probate court of the county in which the estate of the ward, or the principal part thereof, is situated.

Townsend v. Kendall, 4 Minn. (Gil.) 315.

§ 380. **Application for—proofs—order.** The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon application the non-resident guardian must produce and file a certificate, under the hand of the clerk, judge, surrogate, or other authorized officer, and the seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled, by the laws of territory, state, or country of his appointment to the possession of the estate of the ward; or must produce and file a certificate under the hand and seal of the clerk, judge, surrogate, or other authorized officer of the court having jurisdiction, in the country of his residence, of the estates of persons

under guardianship, or of the highest court of such territory, state, or country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court.

Upon such application, unless good cause to the contrary be shown, the judge of the probate court must make an order granting to such guardian leave to take and remove the property of his ward to the territory, state, or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

§ 381. **Effect of order.** Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the probate court the receipt therefor of the foreign guardian of such absent ward.

ARTICLE VI.—GENERAL AND MISCELLANEOUS PROVISIONS.

§ 382. **Complaint against guardian.** Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed or conveyed away any of the money, goods, or effects, or an instrument in writing, belonging to the ward or to his estate, the judge of the probate court may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided by law with respect to persons suspected of, and charged with, concealing or embezzling the effects of a decedent.

In re Guardianship of Minor Heirs of Railsback, 6 N. W. Rep. 713.

§ 383. **Cause for removal.** When a guardian, appointed either by the testator or the probate court or judge, becomes insane, or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the probate court may, upon such notice to the guardian as the court may require, remove him, and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the probate court may appoint another in the place of the guardian who has resigned or has been removed.

In re Guardianship of Minor Heirs of Railsback, 6 N. W. Rep. 713; McWilliams v. Kalbach, 7 N. W. Rep. 463.

§ 384. **Events terminate guardianship.** The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the judge of the probate court when it appears to him, on the application of the ward or otherwise, that the guardianship is no longer necessary.

Secs. 339, 349.

§ 385. **New bonds.** The judge of the probate court may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

Secs. 340, 377.

§ 386. **Bonds preserved—actions upon.** Every bond given by a guardian must be filed and preserved in the office of the probate judge of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate.

§ 387. **Within three years—disabilities.** No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Secs. 37, 207.

§ 388. **Recovery of estate sold.** No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

Sec. 37.

§ 389. **More than one guardian.** The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

§ 390. **Powers exercised by judge or court.** The power conferred upon the probate judge in relation to guardians and wards may be exercised by him at chambers, or as the act of the probate court, when holding such; and any order appointing a guardian must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or the district courts, apply to proceedings under this chapter.

Approved January 27, 1877.

Secs. 1, 17.

JUSTICES' CODE.

An Act to Establish a Code of Proceedings in Courts of Justices of the Peace, and to Limit the Jurisdiction of the Same.

CHAPTER I.

OF CIVIL PROCEEDINGS IN JUSTICES' COURTS.

ARTICLE I.—OF THE JURISDICTION OF JUSTICES' COURTS.

§ 1. **Place of office.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* Justices of the peace must keep their offices and hold their courts at some place selected by them, in their respective townships and counties, in and for which they may be elected, and these courts are always open for the transaction of business.

State of Minnesota v. Marvin, 3 N. W. Rep. 991; Bradley v. Fraser, 6 N. W. Rep. 293.

§ 2. **Civil jurisdiction classified and limited.** The civil jurisdiction of these courts within their respective counties extends:

1. To an action arising on contract, for the recovery of money only, where the sum claimed does not exceed one hundred dollars.

2. To an action for damages for injury to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property, where the title or boundary of such real property does not in anywise come in question, and where the damages claimed do not exceed one hundred dollars.

3. To an action for a fine, penalty, or forfeiture, not exceeding one hundred dollars, given by statute or the ordinance of an incorporated city or town.

4. To an action upon a bond or undertaking conditioned for the payment of money, not exceeding one hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. When the payments are to be made by installments, an action may be brought for each installment as it becomes due.

5. To an action to recover the possession of personal property, when the value of such property does not exceed one hundred dollars.

6. To take and enter judgment on the confession of a defendant, when the amount confessed does not exceed one hundred dollars.

7. To actions of forcible entry and detainer, or detainer only of real property, where the title or boundary thereof in nowise comes in question.

§ 1. **Jurisdiction of township justices.** That all justices of the peace of any township of this territory shall have the same power and jurisdiction in their respective counties as is now or hereafter may be conferred upon justices of the peace by law, and by an act entitled "An act to establish a Code of Procedure in courts of justices of the peace, and to limit the jurisdiction of the same," approved February 13, 1877, and all amendments made or which may be hereafter made to said act. (*Approved March* 1, 1881; *Sess. Laws*, c. 129, § 1.)

§ 2. **Proceedings—how governed.** That the civil and criminal proceedings before all justices of the peace of any township shall be governed and controlled by an act entitled "An act to establish a Code of Procedure in courts of justices of the peace, and to limit the jurisdiction of the same," approved February 13, 1877, and the Code of Criminal Procedure, and all amendments made, or which may be hereafter made, to said act and codes. (*Approved March* 1, 1881; *Sess. Laws* 1881, c. 129, § 2.)

Sec. 103.

§ 1. **Jurisdiction of justices.** That section sixty-two of chapter twenty-four of the Political Code be, and the same is hereby, amended to read as follows:

"§ 62. Justices of the peace of any town heretofore or hereafter organized *under* the provisions of said chapter twenty-four, shall have exclusive jurisdiction to hear and determine all offenses against the ordinances of such town, and concurrent jurisdiction with all other justices in all civil cases, and in all criminal cases for offenses against the laws of the territory, committed within the county where such town is situated; and whenever complaint shall be made to the justice of the peace of such town, upon oath or affirmation of any person competent to testify against the accused, that an offense has been committed of which such justice of the peace has jurisdiction, said justice of the peace shall forthwith issue a warrant for the arrest of the offender, which warrant shall be served by the marshal of the town, the sheriff, or any constable of the county, or any person specially appointed by the justice for the purpose, and in all preliminary examinations before such justice he shall be governed by the Code of Criminal Procedure, and in all trials before such justice for offenses against the territory he shall be governed by the justice's Code." (*Approved February* 17, 1881; *Sess. Laws* 1881, c. 134.)

§ 15. **Jurisdiction of justices over unorganized counties—when territory to pay expenses.** The civil and criminal jurisdiction of justices of the peace in organized counties, in any judicial subdivision containing one or more unorganized counties, shall extend over all such unorganized county or counties in such subdivision; and all summons, warrants, orders, or process issued by such justice of organized counties, shall be served or executed by the sheriff or any constable of the same county; and the costs in all criminal prosecutions in the district and justices' courts, for offenses heretofore or hereafter charged to have been committed, when the same is not collected from the defendant, shall be audited and paid out of the territorial treasury; but no such costs shall be so audited or paid unless a duplicate itemized account of the same shall be certified to as correct by the district attorney of the district, and examined and allowed by the district court, one of which accounts shall be preserved as a public record in the office of the clerk of the district court of the subdivision; and the court shall have full authority to disallow any or all such costs and fees, whenever it deems the same illegally or unnecessarily incurred. And the expenses of all criminal prosecutions arising, or having arisen, in such unorganized counties, including the lawful costs of keeping the prisoners, shall be audited and paid out of the territorial treasury when the same is certified and allowed in the manner prescribed in this section. But no fees, costs, or charges shall be certified or allowed unless the same is first duly adjusted; and no fees, costs, or charges shall be so certified, allowed, or audited, as in this section provided, unless the officer prosecuting the same shall attach to such itemized account an affidavit that the same and every item thereof has been actually, legally, and necessarily incurred, and that no part thereof has been paid. (*Approved February* 23, 1881; *Sess. Laws* 1881, *c.* 87, § 15.)

Jurisdiction.

Of action to foreclose liens. Code Civil Proc. Dak. § 675.
" " under herd law. Code Civil Proc. Dak. § 754.
" " for damages against railroad for injuries to person or property. Code Civil Proc. Dak. §§ 680, 681.
" " in case of estrays. Pol. Code, Dak. *c.* 34.
" " under the poor laws. Pol. Code, Dak. *c.* 33.
" justice of the peace as coroner. Pol. Code, Dak. *c.* 21, §§ 67–87.
" " " " to issue subpœnas. Code Civil Proc. Dak. § 447.
" " " " to take depositions. Code Civil Proc. Dak. § 471.
" " when a school corporation is a party. Sess. Laws 1883, p. 111, § 116.
" " under game laws. Sess. Laws 1883, p. 147, § 6.
" " under act to prevent the spread of glanders. Sess. Laws 1883, p. 148, §§ 2, 3, 4.
" " under road laws. Sess. Laws 1883, p. 261, § 24, and Sess. Laws 1881, p. 198, §§ 3, 4.

Powers and duties assigned to justices of the peace by the Civil Code.

To apprentice children. Secs. 141, 143.
To take acknowledgment of indenture. Secs. 150, 157.
May authorize assignment of indenture. Sec. 151.
To authorize apprenticing of Indian children. Sec. 144.
May issue order to stockholders to call meeting. Sec. 412.
May take proof or acknowledgments of instruments for record. Sec. 656.
To hear complaint against bridge corporation. Sec. 533.

The courts of justices of the peace possess only such jurisdiction as is conferred on them by the organic laws and the statutes of this territory. Code Civil Proc. Dak. § 32.

The territorial jurisdiction of justices of the peace is co-extensive with the limits of the county. Secs. 97, 4. But a non-resident of the county may be summoned to answer on a joint contract. Secs. 16, 17.

Jurisdiction acquired by due legal service of summons. Code Civil Proc. Dak. 102, 103, 104. Newlove v. Woodward, 4 N. W. Rep. 237; Vleit v. Westenhaven, 4 N. W. Rep. 448.

By voluntary appearance. Sec. 11, Code Civil Proc. Dak. § 108.

Jurisdiction as to amount sued for. Bishop v. Freeman, 4 N. W. Rep. 290; Gates v. Neimeyer, 6 N. W. Rep. 150; Henckel v. W. & W. Manuf'g Co. 7 N. W. Rep. 780; Orr v. Le Claire, 12 N. W. Rep. 356; Storm v. Adams, 14 N. W. Rep. 70; Stevens v. Gunz, 23 Minn. 520.

Counter-claim. Sec. 23. Madison v. Spitsnoble, 12 N. W. Rep. 317; Barber v. Kennedy, 18 Minn. (Gil.) 196.

Replevin. Lawrence v. Curtis, 14 N. W. Rep. 483.

Service. Tyrrell v. Jones, 18 Minn. (Gil.) 281.

§ 3. **Criminal jurisdiction—to try—to examine.** These courts shall have criminal jurisdiction to try and determine all cases of misdemeanor, committed within their respective counties, not indictable, where the punishment is a fine not exceeding one hundred dollars, or imprisonment in the county jail for a period not exceeding thirty days, or both such fine and imprisonment. And as to all public offenses which are indictable, they have the power of committing magistrate.

Secs. 104 to 142.

By chapter 35 of Sess. Laws 1879, p. 105, justices of the peace have jurisdiction to fine and imprison for assault and battery, and for petit larceny.

Jurisdiction to punish for drunkenness and disorderly conduct. Sess. Laws 1879, p. 177, § 95.

Jurisdiction to punish for using obscene language. Sess. Laws 1883, p. 202.

Juvenile offenders. Sess. Laws 1883, p. 335, § 11.

Jurisdiction as committing magistrates. Secs. 104, 105, 106; Code Crim. Proc. Dak. § 19.

§ 2. **Court may sentence to hard labor.** Any court, justice of the peace, police court, or police magistrate, in cases where such courts have jurisdiction under the laws of this territory, or as provided by the ordinances or charter of any incorporated town or city in the territory, shall have full power and authority to sentence such convict to hard labor, as provided in said section six hundred and forty, or as provided in this act. (*Acts of* 1879, *c.* 36, § 2.

ARTICLE II.—PLACE OF TRIAL.

§ 4. **Actions, where commenced and tried.** Actions in justices' courts must be commenced, and, subject to the right to change the place of trial as hereinafter provided, must be tried, in the county where the defendant resides, or in which he may be summoned.

Sec. 97.

§ 5. **Causes for change of place.** The court may at any time before the trial, on motion, change the place of trial in the following cases:

1. Where it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party.
2. Where either party makes and files an affidavit that he believes he cannot have a fair and impartial trial, before such justice, by reason of the interest, prejudice, or bias of the justice.
3. When from any cause the justice is disqualified from acting.
4. When the justice is sick or unable to act.

Code Civ. Proc. Dak. § 95.

Justice of the peace disqualified to sit when his township is a party. Sess.

Laws 1879, p. 175, § 83; Rahilly v. Lane, 15 Minn. (Gil.) 360; McGinty v. Warner, 17 Minn. (Gil.) 23; Minnesota v. Bliss, 21 Minn. 458.

§ 6. **But one change, when.** The place of trial cannot be changed on motion of the same party more than once.

§ 7. **When place of trial is ordered changed.** When the court orders the place of trial to be changed, the action must be transferred for trial to a justice's court the parties may agree upon; and if they do not so agree, then to the next nearest justice's court in the same county. (*As amended, Sess. Laws 1881, c. 88.*)

Code Civil Proc. Dak. § 95; sec. 9; Bremner v. Hallowell, 13 N. W. Rep. 412.

§ 8. **Proceedings when order transferring action has been made.** After an order has been made transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of one dollar for the transcript, all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial, unless such notice be waived by consent of parties, and such consent be entered on the docket of the justice. (*As amended, Sess. Laws 1879, c. 32, § 1.*)

Bremner v. Hallowell, 13 N. W. Rep. 412.

§ 9. **New court's jurisdiction.** From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

§ 10. **Title or boundary of lands—district court.** The parties to an action in a justice's court cannot introduce evidence upon any matter wherein the title to, or boundary of, real property in anywise comes in question; and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title to, or boundary of, real property, in anywise, the justice must suspend all further proceedings in the action, and certify the pleadings, and if any of the pleadings are oral a transcript of the same from his docket, to the clerk of the district court of the county or subdivision, on the payment by the plaintiff, of one dollar for such transcript, and all costs accrued before such justice; and from the time of filing such pleadings or transcript with the clerk, the district court has over the action the same jurisdiction as if it had been commenced therein.

Sec. 37.

ARTICLE III.—MANNER OF COMMENCING ACTIONS.

§ 11. **How commenced.** An action in a justice's court is commenced by the issuing the summons, or by the voluntary appearance and pleading of the parties.

Code Civil Proc. Dak. § 108.

§ 12. **Parties in person or by attorney.** Parties in justices' courts may appear and act in person or by attorney; and any person, except by whom the summons or jury process was served, may act as attorney.

§ 13. **Infant's appearance—plaintiff—defendant.** When an infant is a party, he must appear either by his general guardian, if he have one, or by a guardian appointed by the justice as follows:

1. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, upon the application of a relative or friend.
2. If the infant be defendant, the guardian must be appointed at the time the summons is returned, or before the answer. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age; otherwise the justice must make the appointment.

Code Civil Proc. Dak. §§ 78, 79, 80; Prob. Code, Dak. § 345.

§ 14. **Summons—requisites of.** The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, name of the county or township in which the action is commenced, and the names of the parties thereto.
2. A sufficient statement of the cause of action in general terms to apprise the defendant of the nature of the claim against him.
3. A direction that the defendant appear and answer before the justice at his office, at a time specified in the summons.
4. In an action arising on a contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum claimed by him, stating it.
5. In other actions, a notice that unless the defendant so appears and answers, the plaintiff will apply to the court for the relief demanded. If the plaintiff has appeared by attorney, the name of the attorney must be indorsed on the summons.

Sec. 98; Mabbett v. Vick, 10 N. W. Rep. 84; Haskins v. Citizens' Bank, Id. 466; Smith v. Ihling, 11 N. W Rep. 408; Craighead v. Martin, 25 Minn. 41.

§ 15. **Time for defendant's appearance.** The time specified in the summons for the appearance of the defendant, shall in all cases be not less than three nor more than twelve days from its date.

§ 16. **When served in other county—limitation.** The summons cannot be served out of the county of the justice before whom the action is brought, except where the action is brought upon a joint contract or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant resident of the county, or found therein, in which case the summons may be served upon the other defendants out of the county. When the defendant resides in the county, or is summoned therein, the summons cannot be served within two days of the time fixed for the appearance of the defendant; when he resides out of the county, and the summons is served out of the county, the summons cannot be served within seven days of such time.

§ 17. **Who may serve summons—publication—clerk's certificate.** The summons may be served by a sheriff, constable, or any other person not a party to the action, and must be served and returned in same manner as summons in the district court, or in actions of attachment; it may be served by publication; and sections 103 and 104 of the Code of Civil Procedure, so far as they relate to the publication of summons, are made applicable to justices' courts, the word "justice" being substituted for the word "judge" whenever the latter word occurs: *provided*, that when a summons is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal, by the clerk of the district court, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons: *provided, however*, that whenever any summons or other process shall be served by any person other than a sheriff or other duly elected and qualified officer, no fees shall be allowed therefor, either for mileage in traveling or making such service, or for serving said summons or process.

2. This act to apply only to Minnehaha, Bon Homme, Clay, Union, Yankton, and Lincoln county, Dakota territory. (*As amended, Sess. Laws 1883, c. 34.*)

Non-resident administrator to appoint agent to receive service. *Sess. Laws* 1883, *c.* 106.

Goener v. Wall, 2 N. W. Rep. 163; Gilbert v. Brown, Id. 376; Mabbett v. Vick, 10 N. W. Rep. 84; Haskins v. Citizens' Bank, Id. 466; Johnson v. Knoblauch, 14 Minn. (Gil.) 4.

§ 18. **An hour for appearance.** The parties are entitled to one hour in which to appear after the time fixed in the summons, but are not bound to remain longer than that time unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause.

ARTICLE IV.—PLEADINGS.

§ 19. **Form—manner—verification.** Pleadings in justice's courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.
2. May be oral or in writing.
3. Must not be verified, unless otherwise provided in this chapter.
4. If in writing, must be filed with the justice.
5. If oral, an entry of their substance must be made in the docket.

§ 20. **Order of pleadings.** The pleadings are:

1. The complaint by the plaintiff.
2. The demurrer to the complaint.
3. The answer by the defendant.
4. The demurrer to the answer.
5. Reply to the answer.

§ 21. **Complaint—what.** The complaint in justices' courts is a concise statement of the facts constituting the plaintiff's cause of action.

Johnson v. Kloblauch, 14 Minn. (Gil.) 4; Taylor v. Parker, 17 Minn. (Gil.) 447; Royce v. Gray, 21 Minn. 329; Smith v. Hobart, 5 N. W. Rep. 666.

Presumptions in favor of. Clague v. Hodgson, 16 Minn. (Gil.) 291; Olson v. Muskegon Circuit Judge, 13 N. W. Rep. 369; Anderson v. Parke, 10 N. W. Rep. 310.

§ 22. **Demurrer—when.** The defendant may, at any time before answering, demur to the complaint.

Holgate v. Broome, 8 Minn. (Gil.) 209.

§ 23. **Answer—contents of.** The answer may contain a denial of any or all the material facts stated in the complaint, which the defendant believes to be untrue; and also a statement, in a plain and direct manner, of any other facts constituting a defense or counter-claim, upon which an action might be brought by the defendant against the plaintiff in a justice's court.

Holgate v. Broome, 8 Minn. (Gil.) 209; O'Brien v. Pomroy, 22 Minn. 130.

§ 24. **Demurrer to answer.** When the answer contains new matter in avoidance, or constituting a defense or a counter-claim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

§ 25. **Proceedings on demurrer.** The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.
2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.
3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time not exceeding two days, as the court may allow.
4. If the demurrer to an answer is overruled, the plaintiff may, if

the answer contain new matter, reply forthwith. If the answer does not contain new matter, the action must proceed as if no demurrer had been interposed.

Code Civil Proc. Dak. 123; Taylor v. Bissell, 1 Minn. (Gil.) 186; Walker v. McDonald, 5 Minn. (Gil.) 368.

§ 26. **Amendments to pleadings—terms.** Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will, by the amendment, be rendered necessary, require, as a condition to the allowance of such amendment made after issues joined, the payment of such costs to the adverse party as he may be put to by reason of such adjournment. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default, taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment, and upon an affidavit showing good cause therefor.

Judgment by default on amended complaint. Sec. 43.

Amendment ground for postponement of trial, when. Sec. 45; Strine v. Kingsbaker, 10 N. W. Rep. 534; Taylor v. Plumb, 10 N. W. Rep. 282.

§ 27. **Pleading to same.** When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

ARTICLE V.—ATTACHMENTS.

§ 28. **When writ to issue.** In the cases mentioned in section 197 of the Code of Civil Procedure, a writ to attach the personal property of the defendant must be issued by the justice at the time of or after issuing the summons, and before answer, on receiving an affidavit by or on behalf of the plaintiff, stating the same facts as are required to be stated by the affidavit specified in section 199 of the Code of Civil Procedure.

Code Civil Proc. Dak. §§ 197–218.

§ 29. **Undertaking by plaintiff.** Before issuing the writ the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Code Civ. Proc. Dak. § 200.

§ 30. **Requisites of writ.** The writ may be directed to the sheriff or any constable of the county, and must require him to attach and safely keep all the personal property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case, to take such undertaking.

Code Civil Proc. Dak. § 201.

§ 31. **Service and return.** The writ may be served by the sheriff or any constable of the county in which it is issued, and returned in the same manner as warrants of attachments are served and returned in actions in the district court, and with the same force and effect.

Code Civil Proc. Dak. (Service,) §§ 202–209; (Return,) §§ 203, 217.

ARTICLE VI.—CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 32. **When delivery claimable.** In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and article two of chapter eleven of the Code of Civil Procedure is applicable to such claim when made in justices' courts; the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

Code Civil Proc. Dak. §§ 176–187.

ARTICLE VII.—FORCIBLE ENTRY AND DETAINER.

§ 33. **Justices' jurisdiction.** Any justice of the peace within his proper county shall have power to inquire, in the manner hereinafter specified, of all cases of forcible entry and detainer, or detainer only, of real property.

Hoffman v. Parsons, 6 N. W. Rep. 797; Olson v. Muskegon Circuit Judge, 13 N. W. Rep. 369.

§ 34. **Cases where action lies.** This action is maintainable:

1. Where a party has, by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property of another and detains the same.

2. Where a party, after entering peaceably upon real property, turns out, by force, threats, or menacing conduct, the party in possession; or,

3. Where he by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

4. Where a lessee in person or by subtenants holds over after the termination of his lease or expiration of his term, or fails to pay his rent for three days after the same shall be due; or,

5. Where a party continues in possession after a sale of the real property under mortgage, execution, order, or any judicial process, after the expiration of the time fixed by law for redemption, and after the execution and delivery of a deed.

6. Where a party continues in possession after a judgment in partition, or after a sale under an order or decree of a probate court.

Wright v. Gribble, 1 N. W. Rep. 820; Nightingale v. Barnes, 2 N. W. Rep. 767; Leach v. Sutphen, 10 N. W. Rep. 409; Streeter v. Rolph, 14 N.W. Rep. 166.

§ 35. **Notice to quit required.** In all cases arising under subdivisions four, five, and six of the preceding section, three days' written notice to quit must be given to the lessees, subtenant, or party in possession, before proceedings can be instituted, and may be served and returned in like manner as a summons is served and returned.

Gifford v. King, 6 N. W. Rep. 735; Lichty v. Clark, 6 N. W. Rep. 760; Grant v. Marshall, 11 N. W. Rep. 743.

§ 36. **Legal representatives.** The legal representatives of a person who might have been plaintiff, if alive, may bring this action after his death.

§ 37. **Verified complaint—venue.** The complaint must be in writing, and verified by the plaintiff, his agent or attorney, and the proceedings may be had before any justice of the peace of the county where the premises are situated, and shall be governed by the same rules as other cases before justices of the peace, except as herein modified: *provided*, that when the title to, or boundary of, the real property in anywise comes in question, the case shall be certified to the district court as in this chapter provided.

Sec. 10; Blaco v. Haller, 1 N. W. Rep. 978; Petit v. Black, 12 N. W. Rep. 841; Goenan v. Schroeder, 8 Minn. (Gil.) 344; Lindekugel v. Angelhoefer, 24 Minn. 324.

§ 38. **Return-day—adjournment.** The time for appearance and pleading must not be less than two nor more than four days from the time the summons is served on the defendant, and no adjournment or continuances shall be made for more than five days, unless the defendant applying therefor shall give an undertaking to the plaintiff, with good and sufficient surety, to be approved by the justice, conditioned for the payment of the rent that may accrue, together with the costs, if judgment be rendered against the defendant.

Adjournment. Com'rs of Washington Co. v. McCoy, 1 Minn. (Gil.) 78; Wardlow v. Besser, 3 Minn. (Gil.) 223; Holgate v. Broome, 8 Minn. (Gil.) 209; School-dist. No. 7. v. Thompson, 5 Minn. (Gil.) 221; Mattice v. Litcherding, 14 Minn. (Gil.) 110; Burt v. Bailey, 21 Minn. 403.

§ 39. **Judgment where finding is in favor of plaintiff.** If the finding of the court, or the verdict of a jury, be in favor of the plaintiff, the judgment shall be for the delivery of the possession to the plaintiff, and for rents and profits or damages, where the same are claimed in the complaint, and for costs. (*As amended, Sess. Laws 1881, c. 87, § 1.*)

Justice to tax attorney's fee. That in all cases of forcible entry and detainer, or unlawful detainer, now pending, or hereafter brought, the justice shall tax as a part of the costs in the case, to the prevailing party, five dollars as attorney's fees, whether a trial is had or not, whenever an attorney, who is actually an attorney of a court of record of this territory, shall have appeared in such action in behalf of such prevailing party. (*Sess. Laws* 1883, *p.* 133.)

§ 40. **Action under this article, how brought.** An action under the provisions of this article cannot be brought in connection with any other, except for rents and profits or damages; and no execution for possession can be served except in the day-time: *provided*, that the plaintiff may bring separate action under the provisions of this article if he so desire. (*As amended, Sess. Laws 1881, c. 87, § 2.*)

§ 41. **Appeal.** An appeal may be taken in the usual way upon giving the undertaking prescribed in article fifteen of this chapter, which shall suspend all further proceedings until the action is determined in the district court.

Sec. 93.

ARTICLE VIII.—JUDGMENT BY DEFAULT.

§ 42. **Proceedings upon default.** When the defendant fails to appear, and answer or demur, at the time specified in the summons, or within one hour thereafter, then upon proof of service of the summons the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.
2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such a sum, not exceeding the amount stated in the summons, as appears by such evidence to be just.

Judgments by default may be vacated, when. Sec. 26; Roberts v. Hathaway, 4 N. W. Rep. 307; Strine v. Kingsbaker, 10 N. W. Rep. 534; McKay v. Hinman, 13 N. W. Rep. 15; Sess. Laws 1881, *c.* 18.

§ 43. **Same—default presumed.** In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court.
2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once.

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Judgments by default may be vacated when. Sec. 26; Sess. Laws 1881, c. 18.

ARTICLE IX.—TIME OF TRIAL AND POSTPONEMENTS.

§ 44. **When trial to commence—adjournments.** Unless postponed as provided in this article, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, and the trial must be continued, without adjournment, for more than twenty-four hours at any one time, until all the issues therein are disposed of.

Bassence v. Jones, 9 N. W. Rep. 531.

§ 45. **Court may postpone trial — ceases when.** The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time specified in the summons, or by an order of the court for the trial, the court is engaged in the trial of another action.

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of the time to make such amendment, or to plead, a postponement is rendered necessary.

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Sec. 26; Lane v. Leach, 6 N. W. Rep. 228; Com'rs of Washington Co. v. McCoy, 1 Minn. (Gil.) 78.

§ 46. **Postponement by consent.** The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

§ 47. **On application by party—requisites.** The trial may be postponed, upon the application of either party, for a period not exceeding sixty days:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on

the trial, or offered and overruled as improper, the trial must not be postponed.

Com'rs of Washington Co. v. McCoy, 1 Minn. (Gil.) 78.

§ 48. **If longer than ten days, undertaking.** No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

ARTICLE X.—TRIALS.

§ 49. **Issues classified.** Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

§ 50. **Of law.** An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

§ 51. **Of fact.** An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

§ 52. **Law by court.** An issue of law must be tried by the court.

§ 53. **Fact by jury.** An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

§ 54. **Jury, how waived.** A jury may be waived:

1. By consent of parties, entered in the docket.
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact.
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

§ 55. **Failure to appear.** If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

§ 56. **When either party may demand a jury.** When the value in controversy, or sum demanded, exceeds twenty dollars, either party may demand a jury, and upon such demand the justice shall write down the names of eighteen persons, residents of the county, and having the qualifications of jurors in the district court, from which list of names each party, the plaintiff beginning, may strike out three names alternately, and, in case of the absence of either party or of his refusal to strike out, the justice shall strike out of such list such names; and the justice shall, upon the deposit of the jury fee for one day's service by the party demanding the jury, at once issue his *venire*, directed to the sheriff or any constable of the county, commanding him to summon the twelve persons whose names remain upon the list as jurymen. (*As amended, 1879, c. 33.*)

State v. Everett, 14 Minn. (Gil.) 330.

§ 57. **Challenges and talesmen.** Challenges shall be allowed in the same manner and for the same causes as in the district courts in civil actions; and in case the number shall be reduced below twelve by such challenges, or in case any jurors summoned shall fail to attend, the justice shall direct the sheriff or any constable to summon and return forthwith a sufficient number of talesmen, having the qualifications of jurors, to complete the panel. All challenges must be tried in a summary manner by the justice, who may examine the juror challenged, or other witnesses, under oath.

§ 58. **Jury less than twelve.** Parties may agree that the jury shall consist of a less number than twelve jurors; but an agreement to that effect must be in writing, signed by the parties, and filed with the papers in the case, or made in open court, and a minute thereof entered by the justice in his docket.

§ 59. **Oath.** The justice shall administer to the jurors the same oath as is prescribed for jurors in civil actions in the district court.

Code Civil Proc. Dak. § 246.

§ 60. **Production and inspection of papers.** When the cause of action or counter-claim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

§ 61. **Genuineness admitted if not denied.** If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

ARTICLE XI.—JUDGMENTS OTHER THAN BY DEFAULT.

§ 62. **By confession.** Judgments upon confession may be entered up in any justice's court specified in the confession.

Sess. Laws 1881, *c.* 18.

§ 63. **Of dismissal—new action.** Judgment that the action be dismissed, without prejudice to a new action, may be entered, with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted.
2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter.
3. When, after a demurrer to the complaint has been sustained, plaintiff fails to amend it within the time allowed by the court.

Sess. Laws 1881, *c.* 18.

§ 64. **Judgment at once after verdict.** When a trial by jury has been had, judgment must be entered by the justice at once, in conformity with the verdict.

Hull v. Mallory, 14 N. W. Rep. 374.

§ 65. **By the court.** When the trial is by the court, judgment must be entered at the close of the trial.

§ 66. **To recover personal property.** In actions to recover the possession of personal property, the judgment must be entered substantially in the form required by section two hundred and ninety-five of the Code of Civil Procedure.

§ 67. **Excess remitted.** When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

School-dist. No. 1 v. Cook, 10 N. W. Rep. 131; Lamberton v. Raymond, 22 Minn. 129.

§ 68. **Offer of judgment—costs.** If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs; but costs must be adjudged against him, and, if he recover, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence, nor affect the recovery otherwise than as to costs.

Sess. Laws 1881, *c.* 18.

§ 69. **Costs to prevailing party.** The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Who entitled to attorney's fees, and amount. In all actions in justice courts, the party obtaining judgment shall be entitled to attorney's fees, as follows: On all judgments less than twenty-five dollars, an amount equal to twenty per cent. of such judgment; on all judgments over twenty-five dollars and under fifty dollars, five dollars as attorney's fees; on all judgments over fifty dollars, an amount equal to ten per cent. of such judgment as attorney's fees; in actions for the recovery of personal property, the value of the property recovered shall govern the amount of attorney's fees to be recovered in such action; and when judgment is for the defendant, the amount claimed in the plaintiff's complaint shall govern the amount of attorney's fees to be recovered by the defendant: *provided, however,* that no attorney's fees shall be allowed in any such action, unless the party has appeared therein by an attorney of a court of record. (*Acts* 1881, *c.* 18.)

§ 70. **Transcript of judgment.** The justice, on the demand of a party in whose favor judgment is rendered, must give him a certified transcript thereof, on the payment to him of all costs accrued before him, and one dollar for such transcript.

ARTICLE XII.—EXECUTIONS.

§ 71. **Within five years.** Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment, except when it has been taken to the district court on error or appeal, or docketed therein.

§ 72. **Requisites of execution.** The execution must be directed to the sheriff or any constable within the county, and must be subscribed by the justice, and bear the date of its delivery to the officer. It must intelligibly refer to the judgment, stating the names of the parties thereto, in whose favor, against whom, the time when, the county where, and the name of the justice before whom, the judgment was rendered; and it must be made returnable to the justice within thirty days after its date.

Sec. 98.

§ 73. **On money judgment.** An execution issued upon a judgment for a sum of money, must state in the body thereof the sum actually due upon the judgment, and it must substantially require the officer to satisfy the judgment, together with interest and costs, out of the personal property of the judgment debtor; and to bring the money before the justice by the return-day of the execution, to be rendered by the justice to the party who recovered the judgment. If the judgment was rendered for a fine, penalty, or forfeiture of undertakings and bonds, or of recognizances taken or entered in a criminal case, the justice must indorse that fact on the execution.

§ 74. **For possession of personalty.** An execution issued upon a judgment for the delivery of the possession of personal property, shall substantially require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs or damages recovered by the judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery cannot be had.

§ 75. **Same of real property.** An execution issued upon a judgment in an action of forcible entry and detainer, or detainer only, of real property, shall substantially require the officer to deliver the possession of the premises, particularly describing them, to the party entitled thereto, and may at the same time require the officer to satisfy the costs out of the personal property of the party against whom the judgment was rendered.

§ 76. **Renewal of execution.** An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

§ 77. **Sale of personalty—posted notice only.** The provisions of chapter thirteen of the Code of Civil Procedure, relating to the levy and sale or delivery of personal property, so far as the same are applicable and not inconsistent with the provisions of this chapter, apply to and govern the levy, sale, and delivery of personal property under an execution issued by a justice of the peace. And the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff: *provided,* that notice shall not be published in a newspaper, but shall be given by posting for ten days in five public places within the county, one of which shall be at the office of the justice issuing the execution.

ARTICLE XIII.—CONTEMPTS IN JUSTICES' COURTS.

§ 78. **Acts which constitute, classed.** A justice may punish, as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior towards the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.
2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process made or issued by him.

4. Disobedience to a subpœna duly served, or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

Sec. 135.

§ 79. **Summary punishment.** When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily. To that end an order must be made, reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

§ 80. **When not in view.** When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense, or excuse, must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

§ 81. **Penalty limited.** A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

§ 82. **Docket entries.** The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

ARTICLE XIV.—DOCKETS OF JUSTICES.

§ 83. **Justice to keep docket—entries and their order.** Every justice must keep a book, denominated a docket, in which he must enter:

1. The title of every action or proceeding.
2. The object of the action or proceeding, and if a sum of money be claimed, the amount thereof.
3. The date of the summons, and the time of its return; and if a writ of attachment be issued, a statement of the fact.
4. The time when the parties, or either of them appear, or their non-appearance, if default be made; a minute of the pleadings and motions, if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.
5. Every adjournment, stating on whose application, and to what time.
6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.

7. The names of the jurors who appear and are sworn, and the names of all witnessses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included, and the time when rendered.

10. The issuing of the execution, when issued, and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the justice, when and by whom.

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

Sec. 19, (5;) Bidwell v. Coleman, 11 Minn. (Gil.) 45; Payson v. Everett, 12 Minn. (Gil.) 138; Barnes v. Holton, 14 Minn. (Gil.) 275; McGinty v. Warner, 17 Minn. (Gil.) 23; Pynell v. Jones, 18 Minn. (Gil.) 281; State of Minnesota v. Bliss, 21 Minn. 458.

§ 84. **When and how entered.** The several particulars in the last section specified must be entered under the title of the action to which they relate, and unless otherwise in this chapter provided, at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are *prima facie* evidence of the facts so stated.

Sec. 83; Campbell v. Babbetts, 10 N. W. Rep. 400.

§ 85. **Index to docket.** A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

§ 86. **Records and files to successor.** Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records.

§ 87. **When vacancy, to other justice.** If the office of a justice become vacant by his death, removal, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township or county, to be by him delivered to the successor of such justice.

Stamm v. Dixon, 5 N. W. Rep. 858.

§ 88. **Powers of justice receiving—changed county lines.** Any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise, over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

§ 89. **Who may appeal—how taken—what notice to state.** Any party dissatisfied with a judgment rendered in a civil action in a justice's court, may appeal therefrom to the district court of the county or subdivision at any time within thirty days after the rendition of the judgment. The appeal is taken by serving a copy of the notice of appeal on the adverse party or his attorney, and by filing the notice of appeal with the justice. The notice must state whether the appeal is taken from the whole or a part of the judgment, and, if from a part, what part, and whether the appeal is taken on questions of law or fact, or both. (*As amended February 21, 1881.*)

Minneapolis Harvester Works v. Hedges, 7 N. W. Rep. 531; Barber v. Kennedy, 18 Minn. (Gil.) 196; Pettingill v. Donnelly, 7 N. W. Rep. 360.

§ 90. **Proceedings in case of appeal to district court.** When a party appeals to the district court on questions of law alone, or desiring a review therein, upon the evidence appearing on the trial below, either of questions of fact or law, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice; and if no amendments be filed the original statement stands as adopted. The statement thus adopted, or as settled by the justice, with a copy of the docket of the justice, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the district court. (*As amended, Sess. Laws 1879, c. 31, § 1.*)

§ 91. **When action to be tried anew in district court.** When a party appeals to the district court on questions of fact, or on questions of both law and fact, and demands in his notice of appeal a new trial in the district court, no statement must be made, but the action must be tried anew in that court. (*As amended, Sess. Laws 1879, c. 31, § 2.*)

§ 92. **Duty of justice in case of appeal.** Upon receiving the notice of appeal, and on payment of one dollar for the return of the justice, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice must, within five days, transmit to the clerk of the district, if the appeal be on questions of fact, or both law and fact, and a new trial in the district court be demanded in the notice of appeal, a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking filed; in all other cases a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; and the justice may be compelled by the district court, by an order entered, upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice by the party or his attorney. In the district court either party may have the benefit of all legal objections made in the justice's court. (*As amended, Sess. Laws 1879, c. 31, § 3. See chapter 32 of 1879.*)

Stephenson v. Kent Circuit Judge, 6 N. W. Rep. 217.

§ 93. **Undertaking for stay—deposit.** An appeal from a justice's court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property; and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be *recorded* [recovered] against him in said action in the district court, and will obey any order made by the court therein. A deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice, is equivalent to the filing of the undertaking; and in such cases the justice must transmit the money to the clerk of the district court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

Sengpiel v. Spang, 1 N. W. Rep. 463.

§ 94. **Delivery of possession—detainer—requisites of undertaking.** In judgments for the delivery of possession in actions of forcible entry and detainer, or detainer only, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal be dismissed, he will pay all rents for the use and occupation of the property, and all damages from the time of the appeal until the delivery of the possession thereof.

§ 95. **Order to stay execution.** If an execution be issued, on the filing of the undertaking staying proceedings, the justice must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

§ 96. **Powers of district court on appeal.** Upon an appeal heard upon a statement of the case, the district court may review all orders affecting the judgment appealed from, and may set aside, affirm, or modify the judgment, or may, if necessary or proper, order a new trial. When the action is tried anew, upon appeal, the trial must be conducted in all respects as trials in the district court. The provisions of the Code of Civil Procedure as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in that court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the district court, after notice, may order the appeal to be dismissed. Judgments rendered in the district court on appeal have the same force and effect, and may be enforced in the district court in the same manner, as judgments in actions commenced therein, except that when a new trial is granted the case must be remanded, and the new trial shall be had in the justice's court. No notice of trial and note of issue shall be required to be served or filed in order to bring the cause appealed upon the trial calendar in the district court, but said appeal shall be filed by the clerk on payment of his costs and entered upon the calendar, and shall stand for trial as soon as the same is reached in the regular call of the calendar thereafter. If not so filed within fifteen days from the time such appeal was perfected, then the same shall be dismissed by the order of the court at any time thereafter, upon motion of the appellee, after three days' notice to the appellant or his attorney. (*As amended February 17, 1881.*)

ARTICLE XVI.—GENERAL PROVISIONS.

§ 97. **Process throughout county.** Justices of the peace may issue, in any action or proceedings in the courts held by them, any original mesne or final process to any part of the county.

Sec. 4.

§ 98. **Without blank to be filled.** The summons, execution, and every other paper made or issued by a justice, except a subpœna, must be issued without a blank left to be filled by another, otherwise it is void.

Craighead v. Martin, 25 Minn. 41.

§ 99. **Justice to receive moneys.** Justices of the peace must receive from the sheriff or constables of their county all moneys collected on any process or order issued from their courts respectively, and all moneys paid to them in their official capacity, and must pay the same over to the parties entitled or authorized to receive them, without delay.

§ 100. **Other justice may hold court.** In case of the sickness or other disability, or necessary absence, of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township or county may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

§ 101. **Duty of justice when plaintiff is a non-resident.** The justice shall, in all cases where plaintiff is a non-resident of the territory or foreign corporation, before issuing a summons, require of the plaintiff sufficient surety for costs. The surety must be a resident of the county. His obligation shall be complete by simply indorsing the summons, or signing his name on the complaint, as security for costs. In all other cases the justice may, in his discretion, require surety for costs. (*As amended, Sess. Laws 1881, c. 89.*)

Alford v. Jacobson, 1 N. W. Rep. 233 ; Cressey v. Gierman, 7 Minn. (Gil.) 316.

§ 102. **Costs to prevailing party.** The prevailing party in civil actions in justices' courts is entitled to costs.

Errickson v. State of Nebraska, 7 N. W. Rep. 333.

§ 103. **Code of Civil Procedure—how applicable.** Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of the Code of Civil Procedure which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this chapter, are applicable to justices' courts and the proceedings therein.

CHAPTER II.

OF CRIMINAL PROCEEDINGS IN JUSTICES' COURTS.

§ 104. **Committing magistrates—law applying.** Chapters three, four, five, six, and seven of the Code of Criminal Procedure relate to the jurisdiction and duties of justices of the peace as committing magistrates, and direct the mode of proceeding when an information, verified by oath, is laid before them of the commission of a public offense triable on indictment.

Sec. 3.

§ 105. **To keep peace.** Chapter three of title two of the same Code relates to their jurisdiction and duties in cases of security to keep the peace.

§ 106. **Sworn complaint.** All proceedings and actions before a justice's court, for a public offense of which such court has jurisdiction, to try and determine the same, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint.

§ 107. **Warrant—form.** If the justice of the peace is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form:

County of ———. The Territory of Dakota.

To any Sheriff or Constable of said County:

Complaint upon oath having been this day made before me ———— by C. D., that the offense of [designating it generally] has been committed, and accusing E. F. thereof, you are therefore commanded forthwith to arrest the above named E. F., and bring him before me forthwith, at [naming the place.]

Witness my hand at ——— this ———, day of ———, A. D. ———.

A. B.

§ 108. **In other county, how served.** The warrant may be served in any other county in the manner prescribed by sections one hundred and one and one hundred and two of the Code of Criminal Procedure.

§ 109. **Criminal docket.** A docket must be kept by the justice of the peace, in which must be entered each action, and the proceedings of the court therein.

§ 110. **Plea oral—examination.** The defendant may make the same plea as upon an indictment. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury.

§ 111. **When case to be tried.** Upon a plea other than a plea of guilty, if the defendant does not demand a trial by jury, or an adjournment, or change of venue is not granted, the court must proceed to try the case.

§ 112. **Change of venue.** In criminal proceedings in a justice's court, a change of the place of trial may be had at any time before the trial commences, when it appears from the affidavit of the defendant that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the prejudice or bias of such justice; the cause must be transferred to another justice of the same county.

Territory of Dakota v. Egan, 13 N. W. Rep. 568.

§ 113. **Proceedings upon.** When a change of the place of trial is ordered, the justice must transmit to the justice before whom the trial is to be had all the original papers in the cause, with a certified copy of the minutes of his proceedings; and, upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court.

§ 114. **Postponement of trial.** Before the commencement of the trial either party may, upon good cause shown, have a reasonable postponement thereof.

Harrington v. State of Wisconsin, 6 N. W. Rep. 317.

§ 115. **Defendant's presence.** The defendant must be personally present before the trial can proceed.

§ 116. **Trial by jury.** Before the court hears any testimony upon the trial, the defendant may demand a trial by jury. The formation of the jury is provided for in chapter one, article ten, of this Code.

State of Minnesota v. Everett, 14 Minn. (Gil.) 330.

§ 117. **Challenges.** The same challenges may be taken by either party to any individual juror, as on the trial of an indictment for a misdemeanor; but the challenge must in all cases be tried by the court.

§ 118. **Oath to jury.** The court must administer to the jury the following oath:

You do swear that you will well and truly try this issue between the territory of Dakota and A. B., the defendant, and a true verdict render according to the evidence. So help you God.

Any juror who is conscientiously scrupulous of taking an oath, shall be allowed to make affirmation, substituting for the words "So help you God," at the end of the oath, the words "This you do affirm, under the pains and penalties of perjury."

§ 119. **Jury's duty.** After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant.

§ 120. **Court decides law—no charge.** The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.

§ 121. **Jury's consultation—officer.** After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect:

You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court.

§ 122. **Verdict.** The verdict of the jury must in all cases be general. When the jury have agreed on their verdict, they must deliver it publicly to the court, who must enter or cause it to be entered in the docket.

§ 123. **As to part of defendants.** When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case, as to the rest, may be tried by another jury.

§ 124. **When discharged.** The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

§ 125. **Trial again.** If the jury is discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial, and so on until a verdict is rendered.

§ 126. **Judgment upon guilt.** When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment, or both, as the case may be.

§ 127. **Fine and imprisonment.** A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every two dollars of the fine.

Jackson v. Boyd, 5 N. W. Rep. 734.

§ 128. **Acquittal and discharge—prosecutor to pay costs.** When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within thirty days after the trial.

§ 129. **Judgment entered immediately.** At the close of the trial, judgment must be immediately rendered by the justice, and entered in his docket.

§ 130. **Immediate discharge.** If judgment of acquittal is given, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

§ 131. **Mittimus.** When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution.

§ 132. **Custody until fine paid.** When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the time specified in the judgment, unless the fine is sooner paid.

§ 133. **Fines paid over to treasurer—expenses.** Upon payment of the fine to the justice, the officer must discharge the defendant, if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the county treasurer, for the use of the public schools of the county. If a fine is imposed, and paid before commitment, it must be applied as prescribed in this section.

§ 134. **Bail before conviction.** The defendant, at any time after his arrest and before conviction, may be admitted to bail, by giving an undertaking, with sufficient surety in an amount to be fixed by the justice, for his appearance before the justice to answer the complaint.

§ 135. **Subpœnas—contempts.** In all criminal proceedings, the justice may issue subpœnas for witnesses, and punish for contempts as provided for in article thirteen of the Justices' Code.

ARTICLE II.—APPEALS IN CRIMINAL PROCEEDINGS.

§ 136. **Right to appeal—oral notice—issues on appeal.** The justice, immediately on rendering judgment against the defendant, must inform him of his right to appeal therefrom, and the defendant may thereupon take an appeal to the district court of the county or subdivision in which the trial was had, by giving notice orally to the justice that he appeals, and the justice must make an entry on his docket of the giving of such notice; and upon such appeal the action may be tried anew in the district court upon questions of law and fact, or fact alone; or the appeal may be determined therein upon questions of law alone, and the judgment may be set aside, affirmed, or modified, or a new trial granted as provided in section ninety-six of the Justices' Code.

State of Minnesota v. McGinnis, 14 N. W. Rep. 256.

§ 137. **Appeal as in civil actions.** Instead of such appeal, the defendant may, at any time within thirty days after judgment, appeal to such district court in the same manner as provided in sections eighty-nine, ninety, and ninety-one, and such appeal may be determined therein as provided for in section ninety-six of the Justices' Code.

§ 138. **Bail on appeal.** Upon an appeal the justice must enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment shall not be stayed unless he enter into an undertaking in the amount fixed, with sufficient surety, to be approved by the justice, to appear and answer at the next term of the district court, and not depart without leave of the same.

People v. Carroll, 6 N. W. Rep. 871.

§ 139. **Taken by any magistrate.** The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court, or the clerk thereof.

§ 140. **Witnesses may be bound to appear.** When an appeal is taken, the justice must, if application be made by the district attorney, cause all material witnesses on behalf of the prosecution to enter into an undertaking in like manner as in a case where a defendant is held to answer on a preliminary examination for an indictable offense.

§ 141. **Proceedings on appeal — record and papers transmitted.** Upon an appeal being taken, the justice must, within five days, transmit to the clerk of the district court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, if any, and the undertaking of bail; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, if any, and the undertakings filed; and the justice may be compelled by the district court, by an order entered upon motion, to transmit such papers, and if the return be defective, to make further return, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice by the party or his attorney. In the district court, either party may have the benefit of all legal objections made in the justice's court.

§ 142. **No appeal dismissed—new trial.** No appeal from the judgment of a justice of the peace in criminal proceedings shall be dismissed. All proceedings necessary to carry the judgment upon appeal into effect shall be had in the district court: *provided, however,* that when a new trial is granted, the case must be remanded, and the new trial had in the justice's court.

Approved February 13, 1877.

CHAPTER III.

JUSTICES' QUARTERLY REPORT TO COUNTY BOARD.

An Act Requiring Justices of the Peace to make a Quarterly Report to the County Commissioners of their Respective Counties. [Chapter LX., Laws 1874-5.]

§ 1. **Make sworn reports.** *Be it enacted by the Legislative Assembly of the Territory of Dakota:* It shall be the duty of all justices of the peace to make a full report, under oath, of all their proceedings in actions or matters in which the county or territory is a party, or interested therein, to the county commissioners of each of their respective counties, on the first Monday of January, April, July, and October of each year.

§ 2. **Contents of report.** Such report shall contain the names of the parties to the action or proceeding; a statement of all orders made by said justice, whether the defendant be bound over or otherwise; the judgment, whether of dismissal or imprisonment, or for a fine and costs, or either; if for imprisonment, the extent thereof and costs; if for a fine, the amount thereof and costs; the amount of fine and costs paid, if any, and the disposition thereof; an itemized account of the fees of said justices, and of all officers and witnesses, and the names of each.

§ 3. **Must pay over all moneys.** Said justices shall pay into the treasury of their respective counties all fines and moneys collected by them in behalf of the county or territory, at the time of making their reports, as provided in this act; but if, at any time, such moneys in their hands amount to two hundred dollars, they shall pay the same into the treasury forthwith.

§ 4. **Penalty.** Any justice of the peace violating any of the provisions of this act shall be liable to a fine of not less than ten nor more than one hundred dollars, to be recovered in a civil action by the county, which action may be brought originally in the justice's court or the district court.

§ 5. **Violation a crime.** And if any justice of the peace shall neglect or refuse to make such report, or neglect or refuse to pay over the aforesaid moneys collected by them, or shall refuse to allow the county commissioners, or any of them, to examine their records in regard to such matters, they shall be deemed guilty of willful and corrupt misconduct in office.

§ 6. **Effect.** This act shall take effect from and after its passage and approval.

Approved January 15, 1875.

Election and qualifications of justices of the peace. See Pol. Code, Dak., Index.

*

INDEX.

[NOTE. In the following general index the references to the several Codes in this volume are grouped separately under the subject-headings, the Code referred to being indicated in the "section" column at the beginning of each group. "C. C. P." refers to the Code of Civil Procedure, "P. C." to the Probate Code, and "J. C." to the Justices' Code. The abbreviation applies in each case not only to the section to which it is attached, but to all the following sections until a new abbreviation is introduced.]

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